Supreme Court, U.S.
FILED
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No. 011473

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IN THE

Supreme Court of the United States

HUNT TRUCK LINES, INCORPORATED,
An Iowa Corporation,
Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,
and HOWARD MCDOUGALL, trustee,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit properly reversed the district court's award of attorneys' fees to a prevailing employer-defendant under 29 U.S.C. § 1132 (g)(1) of the Employment Retirement Income Security Act, 29 U.S.C. §§ 1001-1368 (1974), by applying the special circumstances exception and the substantial justification rule, as in cases under the Equal Access to Justice Act, when; (1) the First, Second, Third, Fourth, Fifth, Sixth, Tenth, Eleventh and District of Columbia Circuits only apply the five-factor test; and (2) the district court properly applied the five-factor test in awarding attorneys' fees to the prevailing employer-defendant?

2. Whether the Seventh Circuit violated this Court's decisions in *Anderson v. Vessemer City*, 470 U.S. 564 (1985), and *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990), which mandate that the appellate courts cannot substitute their own view for the district court's view under an abuse of discretion standard, by reversing the district court's decision on the issue of attorneys' fees under 29 U.S.C. § 1132 (g)(1), based on the Seventh Circuit's own finding of special circumstances and substantial justification, when the district court properly applied the five-factor test in awarding attorneys' fees to the prevailing employer-defendant?

PARTIES TO THE PROCEEDING

Petitioner is:

Hunt Truck Lines, Incorporated.

Pursuant to Supreme Court Rule 29.6, petitioner declares that petitioner is a privately held corporation with no parent company.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
INTRODUCTION AND STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	3
Proceedings in the District Court	4
Proceedings in the Court of Appeals	6
REASONS FOR GRANTING THE PETITION	7
I. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE RULE FOLLOWED BY THE MAJORITY OF CIRCUIT COURTS REGARDING WHETHER A DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN AWARDING ATTONEYS' FEES UNDER 29 U.S.C. § 1132(g)(1)	9
A. The five-factor test is used by the majority of circuit courts	11
B. The Eighth and Ninth Circuits use the five-factor test with the special circumstances exception only for prevailing plan beneficiaries and ERISA employees	13

TABLE OF CONTENTS—Continued

Page

C. The Seventh Circuit uses the bottom line question approach which permits it to rationalize any outcome 15

II. THE SEVENTH CIRCUIT'S DECISION DEFIES THIS COURT'S DECISIONS IN *COOTER & GELL, ANDERSON* AND *UNDERWOOD* BY SUBSTITUTING ITS OWN OPINION FOR THE DISTRICT COURT'S CONCLUSION WHEN THE STANDARD OF REVIEW WAS ABUSE OF DISCRETION 19

A. The district court's decision was plausible in light of the record viewed in its entirety, and thus the district court's decision was not an abuse of discretion 19

B. The Seventh Circuit substituted its own view for the district court's view in violation of this Court's decision in *Cooter & Gell*, *Anderson* and *Underwood*..... 24

C. Guidance from this Court is needed to clarify the conflicting application by the circuit courts in providing a "meaningful review" to the district court's decision under the abuse of discretion standard..... 28

III. FURTHER ATTRIBUTES OF THIS CASE FAVOR GRANTING CERTIORARI 29

IV. PRACTICAL CONSEQUENCES FAVOR GRANTING CERTIORARI..... 29

CONCLUSION..... 30

TABLE OF CONTENTS—Continued

Page

APPENDICES

1. *Central States, Southeast and Southwest Areas Pension Fund v. Hunt Truck Lines, Inc.*, 272 F.3d 1000 (7th Cir. 2001), *rehearing denied* on Jan 04, 2002 ..... 1a

2. *Central States, Southeast and Southwest Areas Pension Fund v. Hunt Truck Lines, Inc.*, No. 93 C 5634 (N.D.Ill. Sep. 24, 1999) 11a

3. *Central States, Southeast and Southwest Areas Pension Fund v. Hunt Truck Lines, Inc.*, 133 F.Supp.2d 1076 (N.D.Ill. 2000), *judgment followed* on Oct. 31, 2000. ..... 17a

4. *Central States, Southeast and Southwest Areas Pension Fund v. Hunt Truck Lines, Inc.*, No. 96 C 5634 (7th Cir. Jan. 4, 2002). 30a

5. Hunt Truck Lines, Inc.'s *Petition for Rehearing* filed on Dec. 17, 2001 ..... 31a

6. *Central States, Southeast and Southwest Areas Pension Fund v. Hunt Truck Lines, Inc.*, 2001 WL 293079 (N.D.Ill. Mar 26, 2001) (NO. 00 C 1204), *judgment followed* on May 24, 2001 ..... 49a

7. *Central States, Southeast and Southwest Areas Pension Fund v. Hunt Truck Lines, Inc.*, 204 F.3d 736 (7th Cir. 2000) 61a

8. *Central States, Southeast and Southwest Areas Pension Fund v. Hunt Truck Lines, Inc.*, 43 F.Supp.2d 942 (N.D.Ill. 1999). 72a

9. *Central States, Southeast and Southwest Areas Pension Fund v. Hunt Truck Lines, Inc.*, 70 F.Supp.2d 840 (N.D.Ill. 1999). 84a

TABLE OF CONTENTS—Continued

Page

10. *Central States, Southeast and Southwest Areas Pension Fund v. Hunt Truck Lines, Inc.*, AAA No. 51 621 00017 917 (1998) (Jaffe, Arb.), *stipulation followed* on Oct. 14, 1998..... 96a

TABLE OF AUTHORITIES

CASES

Page

Anderson v. Vessemer City, 470 U.S. 564 (1985) .. *passim*
Bellaire Gen. Hosp. v. Blue Cross Blue Shield of Mich., 97 F.3d 822 (5th Cir. 1996) 10
Bittner v. Sadoff & Rudoy Indus., 728 F.2d 820 (7th Cir. 1984)..... *passim*
Bowerman v. Wal-Mart Stores, Inc., 226 F.3d 574 (7th Cir. 2000)..... 16, 21
Chambless v. Masters, Mates & Pilots Pension Plan, 815 F.2d 869 (2d Cir. 1987) 10
Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. Rentar Indus., Inc., 951 F. 2d 152 (7th Cir. 1991) 7, 17, 23, 26
Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990)..... *passim*
Custer v. Pan Am. Life Ins. Co., 12 F.3d 410 (4th Cir. 1993)..... 11
Deboard v. Sunshine Mining and Refining Co., 208 F.3d 1228 (10th Cir. 2000) 21
Denzler v. Questech, Inc., 80 F.3d 97 (4th Cir. 1996) 10, 12
Dixon v. Seafarers' Welfare Plan, 878 F.2d 1411 (11th Cir. 1989)..... 12, 21
Eddy v. Colonial Life Ins. Co. of Am., 844 F.Supp. 790 (D.C. Cir. 1994)..... 12
Ellison v. Shenango Inc. Pension Bd., 956 F.2d 1268 (3d Cir. 1992)..... 11, 12
Fine v. Semet, 699 F.2d 1091 (11th Cir. 1983)..... 21
Gary v. New England Tel. and Tel. Co., 792 F.2d 251 (1stCir. 1986).....10, 11, 12, 16
Gordon v. United States Steel Corp., 724 F.2d 106 (10th Cir. 1983)..... 11

TABLE OF AUTHORITIES—Continued

Page

Harris Trust and Sav. Bank v. Providence Life and Accidence Ins. Co., 57 F.3d 608 (7th Cir. 1995) 16

Inwood Lab., Inc. v. Ives Lab., Inc., 456 U.S. 844 (1982) 8, 20

Libby v. Illinois High School Ass'n., 921 F.2d 96 (7th Cir. 1990) 21

Little v. Cox's Supermarkets, 71 F.3d 637 (7th Cir. 1995) 16, 21

Lutheran Med. Ctr. of Omaha v. Contractors, Laborers, Teamsters and Eng'rs Health and Welfare Plan, 25 F.3d 616 (8th Cir. 1994) 11, 13

Marcus v. Shalala, 17 F.3d 1033 (7th Cir. 1994) .. 21

Martin v. Blue Cross & Blue Shield of Va., Inc., 115 F.3d 1201 (4th Cir. 1997) 10, 12

Maune v. Int'l Bhd. of Elec. Workers, 83 F.3d 959 (8th Cir. 1996) 9, 28

Meredith v. Navistar Int'l Transp. Corp., 935 F.2d 124 (7th Cir. 1991) 10, 12, 16

Milone v. Exclusive Healthcare, Inc., 244 F.3d 615 (8th Cir. 2001), *rehearing en banc denied* on April 30, 2001 ..... 10, 14

Moothart v. Bell, 21 F.3d 1499 (10th Cir. 1994) ... 11

National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976) 24

Pierce v. Underwood, 487 U.S. 552 (1988) ..... *passim*

Pirus v. Bowen, 869 F.2d 536 (9th Cir. 1989) 21, 23

Plumbers and Steamfitters Local No. 150 Pension Fund v. Vertex Constr. Co., Inc., 932 F.2d 1443 (11th Cir. 1991) 12

Riley v. Adm'r. of the Supersaver 401K Capital Accumulation Plan, 209 F.3d 780 (5th Cir. 2000) 20

TABLE OF AUTHORITIES—Continued

Page

Salovaara v. Eckert, III, 222 F.3d 19 (2d Cir. 2000) ..... *passim*

S.A. McElwaine v. US West, Inc., 176 F.3d 1167 (9th Cir. 1999) 9, 13, 21, 28

Smith v. CMTA-IAM Pension Trust, 746 F.2d 587 (9th Cir. 1984) 11, 13

Sweet v. Consol. Aluminum Corp. and Mfr. Hanover Trust Co., 913 F.2d 268 (6th Cir. 1990) 11

Thorpe v. Retirement Plan of the Pillsbury Co., 80 F.3d 439 (10th Cir. 1996) 21

Todd v. AIG Life Ins. Co., 47 F.3d 1448 (5th Cir. 1995) 10, 11, 12

Trustees of the Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) v. Central Transp., Inc., 935 F.2d 114 (7th Cir. 1991) ..... *passim*

Trustmark Life Ins. Co. v. Univ. of Chicago Hosp., 207 F.3d 786 (7th Cir. 2000) 16, 21

Ursic v. Bethlehem Mines, 719 F.2d 670 (3d Cir. 1983) 11

Wilfong v. United States, 991 F.2d 359 (7th Cir. 1993) 8, 28

STATUTES

29 U.S. C. § 1132(g)(1) ..... *passim*

PETITION FOR WRIT OF CERTIORARI

Hunt Truck Lines, Incorporated, petitions for a writ of certiorari to review the decision by the United States Court of Appeals for the Seventh Circuit and the denial of the Petition for Rehearing in this case.

OPINIONS BELOW

Judge Nordberg's decision denying Central States' request for interim payments is reported at 70 F.Supp.2d 840 (N.D.Ill, 1999). App. at 84a. Judge Shadur's decision affirming the arbitration award is reported at 43 F.Supp.2d 942 (N.D. Ill. 1999). App. at 72a. Judge Nordberg's decision granting Hunt Truck Lines, Inc.'s request for attorneys' fees is not published. App. at 11a. Judge Evans' decision affirming Judge Nordberg's decision and affirming both Judge Shadur's decisions affirming the arbitration award and denying Central States' Motion to Amend Judgment is reported at 204 F.3d 736 (7th Cir. 2000). App. at 61a. Judge Nordberg's decision awarding the amount of attorneys' fees to Hunt Truck Lines, Inc. is reported at 133 F.Supp.2d 1076 (N.D. Ill, 2000). App. at 17a. Judge Guzman's decision awarding the final withdrawal liability to Central States is reported at 2001 WL 293079 (N.D.Ill, 2001). App. at 49a. Judge Wood's decision reversing Judge Nordberg's decision on the issue of attorneys' fees is reported at 272 F.3d 1000 (7th Cir. 2001). App. at 1a. The petitioner, Hunt Truck Lines, Inc., respectfully requests this Court to review the Seventh Circuit's decision reversing Judge Nordberg's decision on the issue of attorneys' fees.

JURISDICTION

The judgment of the court of appeals was entered on December 3, 2001. App. at 1a. The timely petition for rehearing was denied on January 4, 2002. App. at 30a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

The Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1368 (1974) provides in pertinent part:

> 29 U.S.C. § 1132 CIVIL ENFORCEMENT
>
> (g)(1) In any action under this title (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

INTRODUCTION AND STATEMENT OF THE CASE

The decision below turns entirely on the following legal questions: (1) whether the Seventh Circuit properly applied the special cir-cumstances exception and the substantial justification rule, as in the cases under the Equal Access to Justice Act, when a prevailing employer-defendant seeks attorneys' fees under 29 U.S.C. § 1132(g)(1); and (2) whether the Seventh Circuit properly applied a deferential standard of review as mandated by this Court, in reviewing the district court's decision on the issue of attorneys' fees under 29 U.S.C. § 1132(g)(1).

There is a split of authority on the first issue presented in this case. The First, Second, Third, Fourth, Fifth, Sixth, Tenth, Eleventh and District of Columbia Circuits apply the five-factor test without any exception. The Eighth and Ninth Circuits have adopted the special circumstances exception to the five-factor test, when a prevailing plan beneficiary seeks attorneys' fees. The Seventh Circuit, however, is the only circuit that has adopted the "bottom line question" approach, and applies the substantial justification rule or the special circumstances exception, even when a prevailing defendant seeks attorneys' fees.

With regard to the second issue, the Seventh Circuit violated this Court's clear mandate in *Pierce v. Underwood*,

487 U.S. 552, 558-561 (1988), *Anderson v. Vessemer City*, 470 U.S. 564, 573 (1985), and *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 400-1 (1990). This Court has a general rule which states that when the standard of review is abuse of discretion, the appellate court cannot substitute its own view for the district court's view. *Anderson*, 470 U.S. at 573; and *Cooter & Gell*, 496 U.S. at 400-1. Currently, there are conflicting messages from this Court as to how far an appellate courts can go, in conducting a "meaningful review" of a district court's decision under 29 U.S.C. § 1132(g)(1).

STATEMENT OF THE FACTS

This case concerns a prevailing employer-defendant's request for attorneys' fees under 29 USC § 1132 (g)(1).

The employer, Hunt Truck Lines, Inc. ("Hunt"), is an Iowa corporation with its principal place of business in Minnesota. Hunt was contractually obligated for many years pursuant to collective bargaining agreements to contribute to the Central States, Southeast and Southwest Areas Pension Fund ("Central States"), on behalf of its employees. App. at 63a. Hunt continued to make those contributions until May 28, 1994, when it sold its assets to Wintz Parcel Drivers, Inc. ("Wintz"). App. at 85a. It is undisputed that the transaction between Wintz and Hunt did not incur any immediate withdrawal liability to Hunt, because the sale of assets did not constitute a "withdrawal" from Central States under the MPPAA. App. at 50a. As a result of this sale, Hunt would be secondarily liable to Central States, only if Wintz made a withdrawal and then failed to make withdrawal liability payments. *Id.*

On June 3, 1996, Hunt received a Notice and Demand for Payment of Withdrawal Liability ("Notice") dated on May 31, 1996 from Central States. Central States assessed Hunt for $303,372.75 in withdrawal liability. App. at 50a.

While the parties were in dispute as to whether a proper Notice was issued, thus triggering Hunt's withdrawal

liability, Central States sued Hunt for unpaid interim payments on September 5, 1996. App. at 86a. Hunt initiated arbitration on December 20, 1996, arguing that the Notice was premature, and that, therefore, it was not liable for the initial assessment. *Id.*

On June 23, 1998, the impartial arbitrator Ira F. Jaffe, Esquire, in an interim award, found that the Notice was premature, and directed Central States to issue a new revised Notice to Hunt. App. at 122a to123a. However, the arbitrator did not provide any money judgment to Central States. *Id.* On July 1, 1998, Central States issued a revised Notice reflecting an initial payment date of November, 1, 1996 as directed by the arbitrator. App. at 87a.

Hunt and Central States stipulated that Wintz withdrew on July 27, 1996, and this finalized the arbitration proceedings on October 14, 1998. App. at 124a.

Proceedings in the District Court

On January 12, 1999, Judge Nordberg, presiding in the district court for the Northern District of Illinois, held that Hunt was not liable for interim withdrawal liability payments. App. at 84a to 95a. The district court, noting that the present case concerned only the issue of interim withdrawal liability payments (App. at 84a), held that Central States could not collect interim withdrawal liability payment because Central States failed to meet the jurisdictional prerequisites under 29 U.S.C. § 1381(a) and §1382, by not providing proper Notice to Hunt.[1] App. at 94a.

Finding a proper Notice as a statutory prerequisite, the district court rejected Central States' argument based on the "pay now and dispute later" scheme. The court stated that:

---

[1] The district court stated, "[a]s such, this court finds that proper and timely notice is a precondition for the triggering of the duty of the employer to make interim withdrawal liability payments." App. at 94a.

> This is not a case where this court is attempting to "examine the employer's probability of success" before the arbitration takes place, *Central Transport*, 935 F.2d at 119, but is instead one where this court is ensuring that the fund [Central States] has complied with the procedural requirements of the MPPAA. Under the MPPAA, a fund is given the unilateral right to initiate the payment process simply by issuing a notice and demand after a statutorily-defined withdrawal has occurred. This court believes that along with this right the fund [Central States] should have a responsibility to proceed in the proper statutory manner.

Id.

On April 8, 1999, after Judge Nordberg decided the issue of interim payments, Judge Shadur in the same district court held that the arbitrator's award should be enforced, but did not give Central States a money judgment. App. at 61a to 62a. Promptly after Judge Shadur's ruling, Central States filed a motion to amend judgment under Federal Rules of Civil Procedure 59(e), requesting a money judgment because there was no money judgment in the arbitrator's award. App. at 65a. Judge Shadur rejected the motion, stating that the only question he was asked to decide was whether the arbitration award should be enforced, and that he answered the question affirmatively. App. at 65a to 66a.

On September 24, 1999, under § 1132 (g)(1), Judge Nordberg granted Hunt's request for attorneys' fees. Judge Nordberg stated that, under either the "substantially justified" test or the "five-factor test," fees are warranted largely because Central States was culpable in "jumping the gun" and prematurely issuing the Notice for Demand. App. at 13a. Judge Nordberg specifically found that:

> The initial culpability was exacerbated by the continued insistence on this position in this litigation. Simply stated, Central States could have terminated this case

> and re-issued a valid notice and demand. An award of attorneys' fees will serve to deter such culpable behavior and will serve to heighten the concern for adhering to the statutory framework, which, as we previously have noted, gives Central States (and others like it) a significant power to unilaterally demand interim payments.

Id.

On February 28, 2000, the Seventh Circuit affirmed both Judge Nordberg's and Judge Shadur's respective decisions. App. at 61a to 71a.

On October 26, 2000, Judge Nordberg determined the amount of the attorneys' fees, ordering Central States to pay Hunt $44,120.00 in attorneys' fees and $105.49 in non-taxable costs on the first fee request; to pay Hunt $73,032.00 in attorneys' fees, $1,505.82 for computerized legal research and $1,358.92 in non-taxable costs on the second request; and to pay Hunt $2,400.00 in attorneys' fees on the third request. App. at 28a. A lengthy opinion was issued determining the exact amount of attorney fees. App. at 17a to 28a.

Proceedings in the Court of Appeals

Central States timely filed its appeal on the issue of attorneys' fees. On December 3, 2001, a panel consisted of three Circuit judges in the Seventh Circuit reversed Judge Nordberg's decision on attorneys' fees, holding that Judge Nordberg abused his discretion. App. at 1a to 10a. The Seventh Circuit stated that the district court erred in failing to take into account the special circumstances of the litigation, and also erred in concluding that Central States had no legitimate justification for its position. *Id.* The Seventh Circuit acknowledged that there are two approaches in reviewing the district court's decision on attorney's fees: (1) the five-factor test; or (2) the substantial justification rule or the special circumstances exception. App. at 5a. The court

adopted the second approach, and found that special circumstances made the fee award unjust, because Hunt had not paid any withdrawal liability, even though Hunt would, allegedly in the court's opinion, ultimately face withdrawal liability. App. at 6a. The Seventh Circuit also found substantial justification for Central States' position under *Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. Rentar Indus., Inc.*, 951 F. 2d 152 (7th Cir. 1991), and *Trustees of the Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) v. Central Transp., Inc.*, 935 F.2d 114 (7th Cir. 1991), which generally support Central States' argument regarding the application of the "pay now dispute later" scheme of the statute. App. at 6a to 9a

Hunt timely filed its Petition for Rehearing on December 17, 2001, (App. at 31a) and the Seventh Circuit denied the Petition on January 4, 2002 without issuing any opinion. App. at 30a.

REASONS FOR GRANTING THE PETITION

The petition for writ of certiorari should be granted for the following reasons.

First, there is a split among the circuit courts in evaluating a district court's decision regarding whether a district court properly exercised its discretion in granting or denying a request for attorney's fees under 29 U.S.C. § 1132(g)(1). The Seventh, Eighth and Ninth Circuits have followed the special circumstances exception, as in cases brought under the Equal Access to Justice Act, in awarding attorneys' fees under 29 U.S.C. § 1132(g)(1). However, the First, Second, Third, Fourth, Fifth, Sixth, Tenth, Eleventh and District of Columbia Circuits have rejected the special circumstances exception, and apply only the five-factor test. Furthermore, in contrast to the rule in the Eighth and Ninth Circuit, the Seventh Circuit applies the special circumstances exception, even when the defendant-employer seeks attorneys' fees.

Second, in the instant case, the Seventh Circuit's decision defies this Court's decisions in *Pierce v. Underwood*, 487 U.S. 552 (1988), *Anderson v. Vessemer City*, 470 U.S. 564 (1985), and *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990). The statute in question, 29 U.S.C. § 1132(g)(1), provides that the decision regarding whether to award attorneys' fees in any ERISA-related action is up to the discretion of the district court. This Court has stated that:

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Anderson, 470 U.S. at 573.

An appellate court cannot substitute its interpretations of the evidence for that of the trial court simply because the reviewing court might give the facts another construction, or resolve the ambiguities differently. *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 858 (1982). The Seventh Circuit in the present case made its own findings, and reversed the district court's decision, even though there was no clear error by the district court. Even though the Seventh Circuit, in *Bittner v. Sadoff & Rudoy Indus.*, 728 F.2d 820, 830 (7th Cir. 1984), has stated that it draws an analogy to the EAJA in determining the issue of attorneys' fees under 29 U.S.C. § 1132(g)(1), the Seventh Circuit defied this Court's decision in *Cooter & Gell*, *Anderson* and *Underwood*, by substituting its own view for the district court's conclusion.

Furthermore, several circuit courts have reversed their district courts' decisions on the same issue under the concept of a "meaningful review." *See Salovaara v. Eckert, III*, 222 F.3d 19, 27-32 (2d Cir. 2000); *Wilfong v. United States*, 991

F.2d 359, 364-368 (7th Cir. 1993); *Maune v. Int'l Bhd. of Elec. Workers*, 83 F.3d 959, 963-964 (8th Cir. 1996); and *S.A.McElwaine v. US West, Inc.*, 176 F.3d 1167, 1171-1173 (9th Cir. 1999). In those cases, the courts of appeal reversed the lower court's decision based on the appellate court's own findings, even though they applied the same abuse of discretion standard in reviewing the lower court's decision. The conflict between a "meaningful review" and a "deferential standard of review" under the same abuse of discretion standard must be resolved in order to maintain this Court's general rule, as expressed in *Cooter & Gell* and *Anderson* and *Underwood*, and to ensure uniformity of the law among the circuits.

I. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE RULE FOLLOWED BY THE MAJORITY OF CIRCUIT COURTS REGARDING WHETHER A DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN AWARDING ATTONEYS' FEES UNDER 29 U.S.C. § 1132(g)(1).

While 29 U.S.C. § 1132(g)(1) clearly provides that the district court has discretion to grant or deny attorneys' fees to a prevailing party in an ERISA action, it is not clear how the district court should exercise its discretion. Although the circuit courts have provided their own guidelines to the district courts within their circuit, there is no uniformity among the circuit courts.

29 U.S.C. § 1132(g)(1) states that "[i]n any action under this title . . . . by a participant, beneficiary, or fiduciary, the court *in its discretion may* allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1) (emphasis added). The statute on its face provides that the standard of review by the appellate courts should be an abuse of discretion because it clearly states that the decision on attorney's fees is within the "discretion" of the district courts.

The appellate court may reverse only if the record clearly shows an abuse of discretion by the district court. *See Gary v. New England Tel. and Tel. Co.*, 792 F.2d 251, 259 (1st Cir. 1986); *Salovaara*, 222 F.3d 27; *Chambless v. Masters, Mates & Pilots Pension Plan*, 815 F.2d 869, 871 (2d Cir. 1987); *Denzler v. Questech, Inc.*, 80 F.3d 97, 103 (4th Cir. 1996); *Martin v. Blue Cross & Blue Shield of Va., Inc.*, 115 F.3d 1201, 1209 (4th Cir. 1997); *Todd v. AIG Life Ins. Co.*, 47 F.3d 1448, 1458 (5th Cir. 1995); *Bellaire Gen. Hosp. v. Blue Cross Blue Shield of Mich.*, 97 F.3d 822, 832 (5th Cir. 1996); *Bittner*, 728 F.2d at 828; and *Milone v. Exclusive Healthcare, Inc.*, 244 F.3d 615, 620 (8th Cir. 2001), *rehearing en banc denied* on April 30, 2001.

In reviewing a district court's decision on attorneys' fees, various circuit courts have held that there is no abuse of discretion, as long as the district court exercises its discretion within the guidelines provided by the circuit court. The First, Second, Third, Fourth, Fifth, Sixth, Tenth, Eleventh and District of Columbia Circuits have adopted the five-factor test without any exception. The Eighth and Ninth Circuits adopted the five-factor test, along with the special circumstances exception, only when a prevailing plaintiff-plan beneficiary seeks attorneys' fees. However, the Seventh Circuit has adopted a unique rule, called the "bottom line question" approach, which allows the five-factor test, the special circumstances exception, or the substantial justification rule, regardless of which party seeks attorneys' fees under 29 U.S.C. § 1132(g)(1).[2] Essentially, this rule permits the Seventh Circuit to rationalize any outcome.

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[2] Application of the special circumstances exception or the substantial justification rule, in determining attorneys' fees under § 1132(g)(1) of the ERISA, originates from an analogy to cases brought under the EAJA. *See Bittner*, 728 F.2d at 830; and *Meredith v. Navistar Int'l Transp. Corp.*, 935 F.2d 124, 128 (7th Cir. 1991). Under these rules, a prevailing plaintiff against the government can recover attorneys' fees, unless special

A. The five-factor test is used by a majority of the circuit courts.

The most widely accepted test by the circuit courts in evaluating a district court's decision in granting attorneys' fees under 29 U.S.C. § 1132(g)(1) is the five-factor test adopted by the First, Second, Third, Fourth, Fifth, Sixth, Tenth, Eleventh and District of Columbia Circuits where it has been held that regardless of whether a prevailing defendant or a prevailing plaintiff seeks attorneys' fees, the court will grant or deny the request for attorneys' fees, based on its determination under the following five factors:

(1) the offending parties' culpability or bad faith;

(2) the ability of the offending parties to satisfy an award of attorneys' fees;

(3) the deterrent effect of an award of attorneys' fees against the offending parties;

(4) the benefit conferred on members of the pension plan as a whole; and

(5) the relative merits of the parties' position.

See Gary, 792 F.2d at 257-58; *Salovaara*, 222 F.3d at 27-28; *Ursic v. Bethlehem Mines*, 719 F.2d 670, 673 (3d Cir. 1983); *Ellison v. Shenango Inc. Pension Bd.*, 956 F.2d 1268, 1273 (3d Cir. 1992); *Custer v. Pan Am. Life Ins. Co.*,12 F.3d 410, 422 (4th Cir. 1993); *Todd*, 47 F.3d at 1458; *Sweet v. Consol. Aluminum Corp. and Mfr. Hanover Trust Co.*, 913 F.2d 268, 271 (6th Cir. 1990); *Lutheran Med. Ctr. of Omaha v. Contractors, Laborers, Teamsters and Eng'rs Health and Welfare Plan*, 25 F.3d 616, 623 (8th Cir. 1994); *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587, 590 (9th Cir. 1984); *Gordon v. United States Steel Corp.*, 724 F.2d 106, 109 (10th Cir. 1983); *Moothart v. Bell*, 21 F.3d 1499, 1507

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circumstances render the fee award unjust, or unless the government's position is substantially justified. *Id.*

(10th Cir. 1994); *Plumbers and Steamfitters Local No. 150 Pension Fund v. Vertex Constr. Co., Inc.*, 932 F.2d 1443, 1453 (11th Cir. 1991); and *Eddy v. Colonial Life Ins. Co. of Am.*, 844 F.Supp. 790, 793 (D.C. Cir. 1994).

Except for the Seventh, Eighth and Ninth Circuits, all of the other circuits strictly follow this five-factor test. The First, Second, Third, Fourth, Fifth, Eleventh and District of Columbia Circuits rejected the special circumstances exception, finding that there should be no presumption in favor of prevailing ERISA plaintiffs. *See Eddy*, 844 F.Supp. at 791-792; *Gary*, 792 F.2d at 258-59; *Ellison*, 956 F.2d at 1274-75; *Martin*, 115 F.3d at 1209; *Todd*, 47 F.3d at 1458-59; and *Dixon v. Seafarers' Welfare Plan*, 878 F.2d 1411, 1412 (11th Cir. 1989). The First Circuit, while rejecting the Seventh Circuit decisions in *Bittner*, stated that it would not adopt special circumstances exception, or substantial justification rule, regardless of whether the prevailing party seeking fees is plaintiff or defendant. *Gary*, 792 F.2d at 258. The Second Circuit has held that "[t]hese [five] factors are applicable regardless of which party seeks attorney's fees" and distinguished its decision from the Seventh Circuit's approach in *Meredith* of the special circumstances or substantial justification rule to prevailing defendants. *Salovaara*, 222 F.3d at 28. The Third and District of Columbia Circuits held that ERISA plaintiffs do not regularly function as private attorneys general in the same sense as civil rights plaintiffs do, and thus reject the special circumstances rule. *See Ellison*, 956 F.2d at 1274; and *Eddy*, 844 F.Supp. at 791-792. The Fourth, Fifth and Eleventh Circuits plainly reject the special circumstances rule, holding that there is no presumption in favor of awarding attorney's fees to a prevailing insured or beneficiary. *See Denzler*, 80 F.3d at 104; *Martin*, 115 F.3d at 1209; *Todd*, 47 F.3d at 1458-59; and *Dixon*, 878 F.2d at 1412. Thus, under these circuit courts, the five-factor test is the guideline that the district court must follow in determining the issue of attorney's fees under 29 U.S.C.

§ 1132(g)(1). Certainly these circuits would have affirmed Judge Nordberg's decision awarding attorneys' fees to Hunt under his analysis in a properly applied five-factor test.

In contrast to the above majority rule, the Eighth and Ninth Circuits have adopted the special circumstances exception to the five-factor test when a prevailing plaintiff-plan beneficiary seeks attorneys' fees. Further, the Seventh Circuit has adopted both the special circumstances exception and the substantial justification rule, regardless of which party is seeking attorneys' fees.

In the present case, Judge Nordberg in the district court properly applied the five-factor test, and found that Hunt was entitled to attorneys' fees. App. at 11a to 14a. However, the Seventh Circuit, applying the special circumstances exception and the substantial justification rule, reversed Judge Nordberg's decision. App. at 1a to 10a. Thus, if the present case was decided by one of the majority circuit courts which adopt only the five-factor test, the underlying district court decision awarding fees would have been affirmed.

B. The Eighth and Ninth Circuits use the five-factor test with the special circumstances exception only for prevailing plan beneficiaries and ERISA employees.

The Eighth and Ninth Circuits have adopted the above five-factor test, with the special circumstances exception when the party seeking attorneys' fees is a prevailing "plan beneficiary" or "successful ERISA participant." *See Lutheran Med. Ctr. of Omaha*, 25 F.3d at 623; *Milone*, 244 F.3d at 620; *S.A.McElwaine*, 176 F.3d at 1172; and *Smith*, 746 F.2d at 589. The special circumstances exception provides that a prevailing ERISA plaintiff is ordinarily entitled to an award of fees, absent "special circumstances" rendering such an award unjust. *Id.*

> This Court has previously stated that when determining whether to award attorney fees, the district court must consider "the degree of culpability or bad faith; the ability to pay an award of attorneys' fees; the deterrent effect an award would have on others; whether the attorney fees are requested to benefit the other plan participants or to resolve legal issues; and the relative merits of the parties' position. . . . Absent "special circumstances," a *plan beneficiary* who successfully enforces her rights under a plan should recover attorney fees.

Milone, 244 F.3d at 620 (emphasis added) (citation omitted).

In the Eighth and Ninth Circuits, the special circumstances exception is triggered when prevailing plaintiffs seek attorneys' fees as a *presumption* favoring ERISA plaintiffs. The language of both circuits is abundantly clear on this point. The Eight Circuit held that "[a] *plan beneficiary* who succeeds in an action to enforce rights under a plan should recover attorney fees unless "special circumstances" would make such an award unequitable." *See Lutheran Med. Ctr. of Omaha*, 25 F.3d at 623 (emphasis added); and *Milone*, 244 F.3d at 620. In *S.A.McElwaine*, the Ninth Circuit also held that it applies "a "special circumstances" rule in which a *successful ERISA participant* should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *S.A.McElwaine*, 176 F.3d at 1172 (emphasis added) (citation omitted).

However, in this present case, the Seventh Circuit applied the special circumstances exception, even though a prevailing defendant, Hunt, is seeking attorneys' fees, and found that the district court erred in not finding the special circumstances, therefore, denying attorneys' fees to a prevailing employer. App. at 6a.

Unlike the Seventh Circuit, the Eighth and Ninth Circuits would have made the special circumstances exception

inapplicable to Hunt's situation, because Hunt is not a plan beneficiary or an ERISA employee seeking attorney's fees. Thus, the Eighth and Ninth Circuits would have applied only the five-factor test, as the district court in the present case did, without finding any special circumstances exception, and, under an abuse of discretion standard, would have affirmed Judge Nordberg's decision.

C. The Seventh Circuit uses the bottom line question approach which permits it to rationalize any outcome.

The Seventh Circuit has a unique rule in evaluating the district court's award of attorneys' fees under 29 U.S.C. § 1132(g)(1). Unlike any other circuits, the Seventh Circuit has adopted the "bottom line approach":

> In *Bittner*, we noted that this test [five-factor test] is "oriented toward the case where the plaintiff rather than the defendant prevails and seeks an award of attorney's fees. Thus, we suggested a more general and less cumbersome approach for requests for attorney's fees under the ERISA. Under that approach (borrowed from the Equal Access to Justice Act, 28 USC 2412(d)(1)(a)), a prevailing party is entitled to reasonable attorney's fees unless the court finds that the position of the losing party was "substantially justified" or that "special circumstances make an award unjust. These words create a modest presumption (modest because of the special circumstances exception) in favor of awarding reasonable attorney's fees to the winning party, plaintiff or defendant, unless the loser's position, while rejected by the court, had a solid basis—more than merely frivolous, but less than meritorious."
>
> . . .
>
> Since *Bittner* we have applied either its approach [special circumstances exception or substantial

> justification test], the five-factor approach **or both**. (citation omitted) Whichever approach is used, the bottom line question is essentially the same: was the losing party's position substantially justified and taken in good faith, or was the party simply out to harass its opponent?

Meredith v. Navistar Int'l Transp. Corp., 935 F.2d 124, 128 (7th Cir. 1991) (citing *Bittner*, 728 F.2d at 830) (emphasis added).

Thus, the Seventh Circuit has decided the issue of attorney's fees under 29 U.S.C. § 1132(g)(1), by answering this bottom line question, because it allows the district court to use any test, i.e., either (1) the five-factor test, (2) the special circumstances exception or the substantial justification rule, or (3) both. App. at 5a. *See Meredith*, 935 F.2d at 128; *Bittner*, 728 F.2d at 830; *Little v. Cox's Supermarkets*, 71 F.3d 637, 644 (7th Cir. 1995); *Trustmark Life Ins. Co. v. Univ. of Chicago Hosp.*, 207 F.3d 786, 884-85 (7th Cir. 2000); *Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574, 592-93 (7th Cir. 2000); and *Harris Trust and Sav. Bank v. Providence Life and Accidence Ins. Co.*, 57 F.3d 608, 616-17 (7th Cir. 1995).

The Seventh Circuit is the only circuit that has adopted the substantial justification rule borrowed from the EAJA cases. *Meredith*, 935 F.2d at 128. Under the substantial justification test, prevailing parties can recover attorneys' fees unless the losing party's position is substantially justified. *See Meredith*, 935 F.2d at 128; *Bittner*, 728 F.2d at 830; *Little*, 71 F.3d at 644; *Harris Trust and Sav. Bank*, 57 F.3d at 616-17; *Trustmark Life Ins. Co.*, 207 F.3d at 884-85; and *Bowerman*, 226 F.3d at 592-93.

The First Circuit expressly rejected the application of the substantial justification rule in the ERISA attorneys' fees' cases. *Gary*, 792 F.2d at 259. In *Gary*, the First Circuit stated that, although there is similarity between the ERISA and the EAJA, "a multi-faceted approach [five-factor test] is

more desirable when fees are to be assessed against parties other than the United States." *Id.* Except for the Seventh Circuit, all other circuits simply do not adopt the substantial justification test, and instead apply only the five-factor test. It is a logical conclusion that, because the last factor of the five-factor test is the "relative merits of the parties' position," the majority of the circuit courts do not consider the substantial justification for the losing party's position a single dispositive factor.

In the present case, the Seventh Circuit found a substantial justification for Central States' position under the "pay now dispute later" scheme under *Rentar* and *Central Transport.* App. at 7a to 9a. *See Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. Rentar Indus., Inc.*, 951 F. 2d 152, 154-59 (7th Cir. 1991); and *Trustees of the Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) v. Central Transp., Inc.*, 935 F.2d 114, 118-19 (7th Cir. 1991). However, Judge Nordberg determined that the "pay now dispute later" scheme was irrelevant, because:

> [t]his is not a case where this court is attempting to "examine the employer's probability of success" before the arbitration takes place, *Central Transport*, 935 F.2d at 119, but is instead one where this court is ensuring that the fund [Central States] has complied with the procedural requirements of the MPPAA.

App. at 94a. Clearly, the district court would not have been reversed, if the Seventh Circuit did not adopt the substantial justification test.

In addition to its unique application of the substantial justification rule, the Seventh Circuit is the only circuit that applies the special circumstances exception, when *a prevailing defendant* seeks attorneys' fees. While the majority of the circuit courts do not adopt the special circumstances exception, the Seventh, Eighth and Ninth Circuits adopt the

special circumstances exception. However, the Eighth and Ninth Circuits apply this exception, only when a *prevailing plaintiff*, such as an ERISA employee or a plan beneficiary, seeks attorneys' fees. While the Eighth and Ninth Circuits use this rule as a presumption favoring prevailing plaintiffs, the Seventh Circuit used the special circumstances exception in creating a "modest presumption" in favor of either prevailing plaintiffs or prevailing defendants. *Bittner*, 728 F.2d at 830. On its face, the rule in the Seventh Circuit modestly favors Hunt because it provides a modest presumption in favor of a winning defendant. However, in this case, the Seventh Circuit applied the special circumstances exception to obtain the opposite result.

In the instant case, the Seventh Circuit reversed the district court's award of attorneys' fees to Hunt, a prevailing defendant, based on its finding of special circumstances that render the fee award unjust.[3]

The Seventh Circuit's application of the special circumstances exception is confusing, and inconsistent with the Seventh Circuit's own reasoning to invoke the modest presumption. While the rule itself was created in favor of granting attorneys' fees to prevailing "defendants," it was used to deny the fee award, even though the strict application of the five-factor test warranted the fee award. Thus, the Seventh Circuit's "bottom line question" rule destroys the alleged "modest" presumption, and permits the Seventh Circuit to rationalize any decision it wants. It also grants the Seventh Circuit unlimited leeway to circumvent this Court's general rule for reviewing abuse of discretion standard cases.

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[3] The special circumstances exception that the Seventh Circuit relied upon was Hunt's failure to pay any withdrawal liability (App. at 6a), although this issue was not before that court. Currently, this issue is under appellate review.

II. THE SEVENTH CIRCUIT'S DECISION DEFIES THIS COURT'S DECISIONS IN *COOTER & GELL, ANDERSON* AND *UNDERWOOD* BY SUBSTITUTING ITS OWN OPINION FOR THE DISTRICT COURT'S CONCLUSION WHEN THE STANDARD OF REVIEW WAS ABUSE OF DISCRETION.

The Seventh Circuit's decision in *Hunt* defies this Court's decisions in *Pierce v. Underwood,* 487 U.S. 552 (1988), *Anderson v. Vessemer City,* 470 U.S. 564 (1985), and *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384 (1990), because the appellate court substituted its own opinion for the trial court's conclusion, even though the standard of review was abuse of discretion.

When the standard of review is abuse of discretion, the reviewing court should not disturb the lower court's decision, as long as the lower court's decision is "plausible in light of the record viewed in its entirety." *Anderson,* 470 U.S. at 573; and *Cooter & Gell,* 496 U.S. at 400-401. Departure from this general rule would inevitably lead to disruption of this Court's decision in *Underwood,* which gave the policy reasons why this Court adheres to the deferential standard in deciding attorneys' fees issues. In the present case, although the district court's decision in *Hunt* was not only plausible in light of the record, but appropriate, the Seventh Circuit reversal of the district court's decision violated the general rule.

A. The district court's decision was plausible in light of the record viewed in its entirety, and thus the district court's decision was not an abuse of discretion.

29 U.S.C. § 1132(g)(1) states that "In any action under this title. . . . by a participant, beneficiary, or fiduciary, the court *in its discretion may* allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1)

(emphasis added). Thus, from the language of the statute, the district court's decision regarding attorneys' fees in the present case should be reviewed under the abuse of discretion standard.

It is a well-established rule that when the standard of review is abuse of discretion, a court of appeals would be justified in concluding that a district court had abused its discretion in making factual findings only if the findings were clearly erroneous. *Cooter & Gell,* 496 U.S. at 400-401. While recognizing that the clearly erroneous standard and the abuse of discretion standard are practically indistinguishable, this Court in *Cooter & Gell,* stated that the appellate court should uphold "any district court's determination that falls within a broad range of permissible conclusion." *Id.* Further, this Court in *Inwood Laboratories, Inc.* explained that:

> An appellate court cannot substitute its interpretations of the evidence for that of the trial court simply because the reviewing court "might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent."

Inwood Lab., Inc., 456 U.S. at 858 (citation omitted).

This general rule has been interpreted among the circuit courts as holding that as long as the district court had a basis in reason, the district court did not abuse its discretion because the abuse of discretion standard prevents the appellate court from substituting its conclusion for the trial court's conclusion.[4]

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[4] *See Riley v. Adm'r. of the Supersaver 401K Capital Accumulation Plan*, 209 F.3d 780, 782 (5th Cir. 2000) (the district court denied the fee award after finding no culpability and without discussing the other four factors. The Fifth Circuit recognized that the abuse of discretion standard *"prevented us from substituting our conclusion for the trial court's on that one factor."* The court affirmed the district court's conclusion,

Here, the district court had a "basis in reason" in granting attorneys' fees to Hunt under 29 U.S.C. § 1132(g)(1). After reciting the applicable rules in the Seventh Circuit in awarding attorneys' fees under § 1132(g)(1), the district court concluded:

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although the court noted that the district court should have considered all the five factors without giving a predominant effect to one factor) (emphasis added); *Libby v. Illinois High School Ass'n.*, 921 F.2d 96, 98 (7th Cir. 1990) (the court stated that "[a]n abuse of discretion generally only occurs where no reasonable person could take the view adopted by the trial court. . . . If reasonable persons could differ, then the appellate court will not be able to find an abuse of discretion."); *Marcus v. Shalala*, 17 F.3d 1033, 1038 (7th Cir. 1994) (the court held that "Based on this authority, a reasonable person could agree with the district court that the government's position was not substantially justified. The Secretary has invited us to review the district court's decision by engaging in our own comprehensive analysis of the statutes and regulations at issue and the numerous cases she cites. Accepting her invitations, however, would require us to engage *in particularized appellate scrutiny*, which is to be avoided in reviewing a lower court's decision for abuse of discretion.") (emphasis added); *Bowerman*, 226 F.3d at 592 (the court stated that as long as there is "a basis in reason," the district court did not abuse its discretion); *Trustmark Life Ins. Co.*, 207 F.3d at 884; *Little*, 71 F.3d at 644; *Pirus v. Bowen*, 869 F.2d 536, 540 (9th Cir. 1989) (the court held that "Our review is limited to assuring that the district court's determination has a basis in reason. . . . Given the highly deferential standard of review mandated by *Underwood*, we cannot say that it was an abuse of discretion for the district court to have concluded that *a reasonable person would not have accepted the Secretary's position.*") (emphasis added); *S.A.McElwaine*, 176 F.3d at 1171 (holding that abuse of discretion occurs only if it failed to state the reasons for the decision or applied incorrect legal standard); *Thorpe v. Retirement Plan of the Pillsbury Co.*, 80 F.3d 439, 445 (10th Cir. 1996) (holding that "while we might have reached different conclusion, the district court did not abuse its discretion"); *Deboard v. Sunshine Mining and Refining Co.*, 208 F.3d 1228, 1245 (10th Cir. 2000) (holding that "Although different judges might have chosen to grant fees, we find no abuse"); *Dixon*, 878 F.2d at 1412 (holding that when the district court can go either way, there is no abuse); and *Fine v. Semet*, 699 F.2d 1091, 1095 (11th Cir. 1983) (holding that when the district court can go either way, there is no abuse).

> [F]ees are warranted largely because Central States was culpable in "jumping the gun" and prematurely issuing the Notice for Demand. The initial culpability was exacerbated by the continued insistence on this position in this litigation. Simply stated, Central States could have terminated this case and re-issued a valid notice and demand. An award of attorneys' fees will serve to deter such culpable behavior and will serve to heighten the concern for adhering to the statutory framework, which, as we previously have noted, gives Central States (and others like it) a significant power to unilaterally demand interim payments.

App. at 13a.

The district court made proper findings under the five-factor test.[5] App. at 12a. As to the first factor, the offending parties' culpability or bad faith, the district court found that Central States was culpable for "jumping the gun," by prematurely issuing the Notice and Demand and violating the statute. App. at 13a. The district court did not discuss the second factor, but it was obvious that Central States has the ability to pay attorneys' fees. As to the third factor, the deterrent effect, the district court noted that, in the light of the pension fund's power granted by the MPPAA, the award of the attorneys' fees would have a deterrent effect on such culpable behavior by Central States. *Id.* The fourth factor, the benefits conferred on others, was also discussed, when the district court stated that the award would serve to heighten the concern for adhering to the statutory framework. *Id.* As to the last factor, the district court found that Central States'

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[5] Although it did not say which test the court is applying, the clear language in the opinion demonstrated that the district court used the five-factor test. Also, even if the opinion is analyzed under the substantial justification rule adopted in the Seventh Circuit, the result should be same, because the last factor of the five-factor test requires examination of the relative merits of the parties' position.

position in the litigation was not justified, because Central States "could have terminated this case by simply re-issuing a valid notice" instead of suing the employer (Hunt) for interim payments. *Id.* This finding on the last factor must be read in light of Judge Nordberg's decision on January 12, 1999, which found that Central States was not entitled to the interim payments, because of its failure to meet statutory prerequisites.[6] App. at 94a. In deciding the issue of attorneys' fees on September 24, 1999, the district court considered its previous opinion, and concluded that Central States exacerbated its initial culpability by its continued insistence on its position throughout this lengthy litigation. App. at 13a.

The district court applied the proper rule of the Seventh Circuit, and its conclusion has a "basis in reason," and a reasonable person could have agreed with its finding. *See Pirus v. Bowen*, 869 F.2d 536, 540 (9th Cir. 1989); and *Anderson*, 470 U.S. at 573-74. By reversing the district court's decision, the Seventh Circuit violated this Court's mandate that the reviewing court should not disturb a lower court's decision, as long as the lower court's decision is "plausible in light of record viewed in its entirety." *Anderson*, 470 U.S. at 573-74.

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[6] In his opinion on January 12, 1999, Judge Nordberg rejected the Central States' argument that it is entitled to the interim payments under the "pay now and dispute later" scheme of *Rentar* and *Central Transport*. App. at 94a. The district court held that the cases that dealt with "pay now dispute later" scheme were irrelevant since the present case did not deal with the employer's probability of success, but rather dealt with "a jurisdictional prerequisite." *Id.* Clearly, the district court considered all the arguments of Central States, and decided not to allow Central States to collect interim payments.

B. The Seventh Circuit substituted its own view for the district court's view in violation of this Court's decision in *Cooter & Gell, Anderson* and *Underwood.*

The Seventh Circuit reversed the district court decision on the ground that the district court erred in not considering the special circumstances of the pending litigation and not finding substantial justification for Central States' position. However, the district court considered all the facts and arguments that the Seventh Circuit used, but found a different result. Thus, the current Seventh Circuit's decision clearly conflicts with the general rule, because the Seventh Circuit substituted its own view for the district court's view by giving different weight to the same facts.

The Seventh Circuit in the present case should have conducted its review on whether the district court abused its discretion in awarding the attorney's fees, not on whether the Seventh Circuit *as an original matter* would have found that there was substantial justification or special circumstances. This Court condemned the same appellate approach in *National Hockey League. National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976). In *National Hockey League,* the district court dismissed the plaintiff's claim and imposed sanctions under Rule 37 of Federal Rules of Civil Procedure. *Id.* The appellate court reversed the district court's decision after conducting its own review of the record. Rejecting this approach, this Court stated that "[t]he question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing." *Id.* The Seventh Circuit has made the same mistake as the appellate court in *National Hockey League.* The Seventh Circuit asked itself whether the Seventh Circuit as an original matter would have found that there was a substantial justification or special circumstances. By answering this question affirmatively, it

reversed the district court's decision. Thus, the Seventh Circuit erred in substituting its view for the district court's view when the standard of review was abuse of discretion.

Here, the Seventh Circuit found that special circumstances made the fee award unjust because the petitioner, Hunt, has not paid any withdrawal liability. According to the Seventh Circuit's "crystal ball," it concluded that Hunt would ultimately be liable for withdrawal liability payments. App. at 6a. The Seventh Circuit's reasoning is faulty for two reasons. First, its reasoning assumes that there is a liability, even though the liability has not been adjudicated, and there is no guarantee that the petitioner will be found liable.[7] Second, the reasoning is absurd because the district court awarded the attorneys' fees primarily for services incurred prior to the award of attorneys' fees, concerning only the issue of the interim payments. Furthermore, in sharp contrast to the district court's opinion (App. at 13a), the Seventh Circuit did not give any weight to the fact that the litigation was initiated by Central States, and it is Central States that issued a premature Notice in violation of the MPPAA. App. at 1a to 10a. It is clear from the opinions of both the district court and the Seventh Circuit that each court reviewed the facts, and gave different weight to the same facts. In doing so, the Seventh Circuit violated the clear mandate of this Court that "where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson*, 470 U.S. at 573.

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[7] On March 26, 2001, Judge Guzman in the district court granted the Central States' summary judgment for withdrawal liability payments. App. at 49a. Hunt defended based upon the doctrine of res judicata. On May 24, 2001, Judge Guzman entered Judgment Order granting Central States in the total amount of $522,610.07, including withdrawal liability payments, interests, doubled interests, costs and attorneys' fees. App. at 59a. The issue of Hunt's final withdrawal liability is currently under appellate review. Oral argument was held on January 25, 2002. Hunt is seeking reversal based upon the doctrine of res judicata.

The Seventh Circuit also found substantial justification in Central States' position from *Rentar* and *Central Transport*. App. at 6a to 9a. *See Rentar Indus., Inc.*, 951 F. 2d at 154-59; and *Central Transp., Inc.*, 935 F.2d at 118-19. While the Seventh Circuit agreed with the district court's decision on the issue of the interim payments, and thus concluded that *Rentar* and *Central Transport* were not controlling in the present case (App. at 1a to 10a), the Seventh Circuit still found that Central States' reliance on these cases was substantially justified. *Id.* However, the notable fact is that the district court also considered *Rentar* and *Central Transport*, and found them irrelevant. Under the policy in *Underwood*, the decisions in *Rentar* and *Central Transport* were simply a "fact," not law that the district court considered, and decided not to give any weight.

This Court in *Underwood* clearly stated that, although the issue of substantial justification is sometimes purely legal, abuse of discretion is the proper standard in determining the attorneys' fees in the EAJA cases in order to prevent "untoward consequences":

> In all the separate-from-the-merits EAJA appeals, the investment of appellate energy will either fail to produce the normal law-clarifying benefits that come from an appellate decision on a question of law, or else will strangely distort the appellate process. The former result will obtain when (because of intervening legal decisions by this Court or by the relevant circuit itself) the law of the circuit is, at the time of the EAJA appeal, quite clear, so that the question of what the Government was substantially justified in believing it to have been is of entirely historical interest. Where, on the other hand, the law of the circuit remains unsettled at the time of the EAJA appeal, a ruling that the Government was not substantially justified in believing it to be thus-and-so would (unless there is some reason to think it has

> changed since) effectively establish the circuit law in a most peculiar, secondhanded fashion. Moreover, the possibility of the latter occurrence would encourage needless merits appeals by the Government, since it would know that if it does not appeal, but the victorious plaintiff appeals the denial of attorney's fees, its district-court loss on the merits can be converted into a circuit-court loss on the merits, without the opportunity for a circuit-court victory on the merits. All these untoward consequences can be substantially reduced or entirely avoided by adopting an abuse-of-discretion standard of review.[8]

Underwood, 487 U.S. at 560-61.

Here, by reversing the district court's decision, the Seventh Circuit ignored this Court's guidelines in *Underwood*. Simply, the Seventh Circuit's ruling on the issue of the substantial justification in *Hunt* is "of entirely historical interest," because previously the Seventh Circuit had agreed with the district court's decision regarding the statutory interpretation.[9] App. at 66a to 69a. Furthermore, there is nothing in the Seventh Circuit's opinion that suggests that a reasonable person could not agree with the district court's decision. App. at 1a-10a.

The Seventh Circuit violated the general rule that an appellate court cannot substitute its interpretation of the evidence for that of the trial court, simply because the

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[8] The Seventh Circuit in *Bittner* stated that it follows the analogy to EAJA in determining the issue of attorney fees under 29 U.S.C. § 1132(g)(1). *Bittner*, 728 F.2d at 830. Thus, the rule in *Underwood* is controlling in this case.

[9] Prior to the Seventh Circuit's decision by Judge Wood, Judge Evans, also presiding in the Seventh Circuit, affirmed Judge Nordberg's decision regarding the issue of interim payments. Thus, in the Seventh Circuit, the law is clear on the point that a pension fund must give the withdrawing employer a proper Notice before it can claim interim payments. App. at 66a to 69a.

reviewing court "might give the facts another construction, or resolve the ambiguities differently." The Seventh Circuit substituted its own view for the district court's view, even though the district court had a "basis in reason," and made no error in law, fact or judgment. In doing so, the Seventh Circuit defies the policy for the abuse of discretion standard as expressed by this Court in *Underwood* and fails to produce the normal law-clarifying benefits that come from an appellate decision on a question of law.

C. Guidance from this Court is needed to clarify the conflicting application by the circuit courts in providing a "meaningful review" to the district court's decision under the abuse of discretion standard.

Several circuit courts reversed their district courts' decisions on the same issue under the concept of a "meaningful review," as the Seventh Circuit in *Hunt* did. In reversing the district court, the Seventh Circuit, according to its language, conducted a meaningful review. For example, in *Wilfong*, the Seventh Circuit reversed the lower court's decision on the same issue after conducting its own review of record, even though the district court applied the proper rules of the Circuit. *Wilfong,* 991 F.2d at 364-368. Also, in *Salovaara*, the Second Circuit, after stating that "we nevertheless need to ensure that decision is made with restraint and discretion," reversed the lower court's decision from its own complete review. *Salovaara,* 222 F.3d at 27-32; *See also Maune,* 83 F.3d at 963-964 (the court stated that it will not reverse the district court's decision unless there is a "clear error of judgment in weighing the relevant factors." However, after conducting its own review, the court reversed the district court's determination); and *S.A.McElwaine v. US West, Inc.*, 176 F.3d 1167, 1171-1173 (9th Cir. 1999). In those cases, the courts of appeals reversed the lower court's decision based on the appellate court's own conclusion, although they claimed

to apply the abuse of discretion standard in reviewing the lower court's decision. From these cases, it is not clear how far an appellate court can go in reviewing the lower court's decision under the abuse of discretion standard.

III. FURTHER ATTRIBUTES OF THIS CASE FAVOR GRANTING CERTIORARI

For several reasons, the procedural posture of this case makes it ideal for this Court's review. First, the questions presented are devoid of any factual dispute. For example, it is undisputed that Central States sent a premature Notice and Demand, and the Seventh Circuit noted that Central States readily admitted this fact. App. at 68a to 69a. Second, the judgment below turns entirely on the legal standard employed by the Seventh Circuit. Third, the inconsistent application of the deferential standard of review by the courts of appeal is a fundamental problem that requires clarification by this Court to avoid further confusion between the courts of appeal and their district courts.

IV. PRACTICAL CONSEQUENCES FAVOR GRANTING CERTIORARI

This Court's review is also warranted because the existing split in the circuits has disruptive economic and jurisprudential ramifications. The conflicting opinions among the circuits require a decision from this Court to ensure uniformity of the rule governing the award of attorneys' fees under 29 U.S.C. § 1132(g)(1).

Furthermore, clarification on the scope of the district court's discretion under 29 U.S.C. § 1132(g)(1) is particularly important for employers who may not have the financial ability to defend a pension fund's premature notices and lawsuits that are brought in violation of the MPPAA. As stated in the district court's opinion in granting attorneys' fees to Hunt, it is clear that Central States has the power under the MPPAA to "unilaterally demand interim

payments." App. at 13a. This Court's guidance will assure compliance with the MPPAA by requiring a pension fund to follow the statutory framework, before it exercises such unilateral power. Otherwise, the practical consequence of this litigation will be to spread an undesired message from this Court that a pension fund may "jump the gun," without following the statutory framework. Finally, it will discourage employers from defending lawsuits brought contrary to the statute, by forcing the innocent employer who is subject to a pension fund's lawsuits brought in violation of the MPPAA to pay their own attorneys' fees without recourse.

CONCLUSION

Guidance from this Court is plainly needed in the present case to give uniformity among the circuits by providing proper guidelines for a district court in exercising its discretion on the issue of attorney's fees under 29 U.S.C. § 1132(g)(1); and to clarify the extent of the deferential standard of review, and the application of policy behind the abuse of discretion standard under *Underwood*. Moreover, the absence of factual disputes on the critical issues in this case offers an ideal record for this Court's consideration. Therefore, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 00-3922

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and HOWARD MCDOUGALL,
Plaintiffs-Appellants,

v.

HUNT TRUCK LINES, INC.,
an Iowa corporation,
Defendant-Appellee.

Argued May 14, 2001.
Decided Dec. 3, 2001.
Rehearing Denied Jan. 4, 2002.

Before BAUER, ROVNER, and DIANE P. WOOD, *Circuit Judges.*

DIANE P. WOOD, *Circuit Judge.*

Prior to a series of corporate sales and bankruptcies, Hunt Truck Lines participated in the Central States, Southeast and Southwest Areas Pension Fund. In 1996, Central States determined that Hunt owed withdrawal payments to the fund. It accordingly sent a notice demanding that Hunt begin making interim payments while the parties arbitrated Hunt's ultimate liability. Hunt, however, refused to pay. Central States responded with this suit seeking the interim payments. Despite the broad power pension funds generally have to demand such payments, the district court refused to order

Hunt to pay, finding that this was one of those rare cases in which the fund had exceeded its powers. In February 2000, a panel of this court affirmed that decision. *Central States, Southeast and Southwest Areas Pension Fund v. Hunt Truck Lines, Inc.*, 204 F.3d 736 (7th Cir.2000) (*Hunt I*). Hunt then returned to the district court to request attorneys' fees, and the district court awarded it over $100,000. Central States has appealed that award, arguing that its position in the underlying case was substantially justified and that special circumstances exist in this case that make an award of fees unjust. We agree with Central States and reverse the judgment of the district court.

I

In 1994, Hunt withdrew from the Central States pension fund. In many circumstances, this action would have given rise to withdrawal liability on Hunt's part under the relevant provisions of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381-1461 (MPPAA). Because Hunt sold its assets to another company, Wintz Parcel Drivers, Inc., however, the situation was more complicated. As long as *Wintz* continued to make payments to the fund, Hunt did not face withdrawal liability under the MPPAA. In 1996, one of Wintz's subsidiaries went bankrupt, which triggered withdrawal liability on Wintz's part under the relevant statutes. Central States first sent a notice to Wintz demanding that it begin making installment payments on the withdrawal liability, but Wintz defaulted. Its default permitted Central States to pursue Hunt's secondary liability for the withdrawal payments.

On May 31, 1996, Central States sent Hunt a notice demanding that it begin making installment payments on its withdrawal liability. Hunt refused, and Central States brought this lawsuit. At the same time, Central States commenced arbitration to determine Hunt's final liability.

The provisions of the MPPAA that give pension plans the right to demand interim payments of withdrawal liability are quite broad, and the general rule is that the plan is entitled to receive interim payments while the parties arbitrate the employer's ultimate withdrawal liability. See, *e.g.*, *Trustees of the Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. Central Transp., Inc.*, 935 F.2d 114, 118 (7th Cir.1991). There are very few exceptions to the plan's right to such payments, because the purpose of the interim payment provisions is to ensure that the plan is protected from the risk of insolvency and that it remain fully funded while the parties arbitrate their dispute. The statute mandating arbitration of disputes over withdrawal liability would be thwarted if employers could litigate the merits of their claims before interim payments were made. See *id.* at 118-19. In most cases, therefore, when a plan seeks an order for interim payments, the district court enters the order as a matter of course.

This case proved to be an exception to that rule. In the district court, Hunt pointed out that Central States sent the notice and demand to Hunt on May 31, but that in its memorandum in support of summary judgment in the district court, Central States stated that Wintz withdrew from the plan "on or about July 20." Because Hunt could not have incurred withdrawal liability until Wintz actually withdrew from the plan, it was apparent that Central States had sent the notice to Hunt at least a month and a half before Hunt incurred any liability. Hunt argued that, although the provision for interim payments was broad, at a minimum the statute did not allow Central States to seek payments until after Hunt incurred withdrawal liability. Central States responded to this assertion in two ways. First, it argued that it thought the withdrawal might have occurred as early as May 3, and that since the date of withdrawal was disputed, that issue should be submitted to arbitration. In addition, Central States argued that, even if its notice was premature, it was clear that Wintz had withdrawn

by the time Central States filed its complaint in the district court on September 5, and so the district court could order the interim payments despite the fact that the initial notice was premature.

The district court sided with Hunt, and a panel of this court affirmed that decision. *Hunt I*, 204 F.3d at 743. We rejected Central States' effort to argue that "on or about July 20" could mean "as early as May 3" and held instead that Central States would be bound by the admission it made in its summary judgment memorandum; this meant that the date of withdrawal was not legitimately in dispute. *Id.* at 742. We also ruled that, under the MPPAA, a pension fund was not permitted to issue a notice and demand for withdrawal liability until after the employer incurred such liability. *Id.* Because Central States did not comply with this statutory requirement, we agreed that Central States could not collect interim payments based on the May 31 notice. *Id.*

Although Hunt prevailed on the narrow question presented, this court was careful to note that the decision would not preclude Central States from recovering the withdrawal payments once it issued a revised demand notice. In closing *Hunt I*, this court opined that "it appears certain that Central States will (and should) receive the full withdrawal fee to which it is entitled," and warned that "Hunt should comply with the fund's later demand." *Id.* at 743. Central States indeed filed a revised notice, quite promptly. Nevertheless, as of the date of oral argument in this case, Hunt had yet to pay a dime on the underlying liability.

Far from agreeing to pay what it owes, Hunt instead filed a number of motions in the district court seeking to have Central States pay Hunt for its attorneys' fees in litigating *Hunt I*. Hunt did prevail on the only issue it raised in the case, which was whether Central States could demand interim payments based on a premature notice of liability. There is a modest presumption in ERISA cases in favor of awarding

attorneys' fees to the prevailing party, *Meredith v. Navistar Int'l Transp. Corp.*, 935 F.2d 124, 128 (7th Cir.1991), and the district court accordingly granted Hunt's fee petitions. Despite the presumption in favor of awarding fees in usual cases, however, we believe that the district court erred in failing to take into account the broader context of this litigation.

II

ERISA generally permits a district court to award attorneys' fees to either party in a dispute over withdrawal liability. 29 U.S.C. §1132(g). This court has described the approach the district courts should take in determining whether to award fees in ERISA cases in two ways. The first looks to five factors that the court should consider in connection with the fee question: (1) the degree of the losing party's culpability or bad faith; (2) the ability of the losing party to satisfy an award of fees; (3) whether an award of fees against the losing party would deter others from acting under similar circumstances; (4) whether the party requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions. *Meredith*, 935 F.2d at 128. The second approach indicates that the district court should award fees to the prevailing party unless either (1) the losing party's position was substantially justified or (2) special circumstances make a fee award unjust. *Id.* In the end, we think these two formulations are simply alternative ways of making the same basic point: as we have put it before, "the bottom-line question is . . . : was the losing party's position substantially justified and taken in good faith, or was that party simply out to harass its opponent?" *Id.* We review the district court's decision to award fees for abuse of discretion. *Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574, 592 (7th Cir.2000).

Here, in the broader context of this litigation, an award of fees would do nothing but encourage the very foot-dragging and avoidance of interim payment liability that the statute was designed to prevent, and thus would be "unjust." The district court apparently felt that it was without power to consider events not directly related to the case before it. This assumption was in error. Our cases make clear that a district court considering an award of fees should take into consideration any "special circumstances" which would make an award of fees unjust, see *Meredith*, 935 F.2d at 128, and that directive is broad enough to encompass consideration of pending, related litigation between the parties.

Once we take this broader context into account, it becomes clear why fees would be inappropriate here. Although Hunt won this round of its battle with Central States, as far as we can tell from the record, there is no dispute that Hunt will ultimately face withdrawal liability. Nevertheless, Hunt has continued to refuse to make payments to Central States, and as of the date of oral argument in this case had not paid anything. The fact that Hunt has now managed to put off making its first payment on its liability for several years confirms our suspicion that Hunt's primary motivation in this case was not to force Central States to issue a new demand notice revising the withdrawal date by a few months (which Central States has long since done), but to delay paying its withdrawal liability for as long as possible. In the face of Hunt's obstinance, it would be unjust to require Central States to pay Hunt over $100,000. Given the fact that Hunt apparently is not financially stable and that Central States fears that, when it finally does receive an enforceable award against Hunt, Hunt will no longer be able to pay, the injustice of ordering an award at this stage is particularly acute.

We also conclude that the district court erred in concluding that Central States had no legitimate justification for its position in the underlying litigation and was pursuing the case

in bad faith. The district court was understandably unimpressed with Central States' argument that when it said Wintz withdrew from the plan "on or about July 20," it might have meant as early as May 3. Perhaps that rather silly assertion detracted from the force of Central States' key point, which was that the legal question it was presenting was not so simple after all. The district court thought it clear under the relevant statutes that Central States had overstepped its bounds by trying to collect interim payments based on a premature demand notice. Noting that Central States still had the power to reissue a valid notice, the district court believed that an award of fees would serve as a deterrent to Fund attempts to skirt the statutory framework in the future. Finally, although the district court acknowledged that Central States was likely to prevail on the issue of Hunt's ultimate liability, it regarded that issue as relevant only to the related cases before other judges and not to the merits of the parties' positions in the case before it.

In fact, the issues that Central States was litigating were more complex than the district court acknowledged and its position was, even if not ultimately a winning one, substantially justified. In several cases prior to *Hunt I*, we stressed that under the MPPAA an employer is required to make interim payments at the fund's request in almost all cases. It therefore followed, we said, that we would refuse to order interim payments only if the employer could show both (1) that the fund did not have even a colorable claim on the merits of its assessment of liability, and (2) that making the interim payments while the claim's merits were arbitrated would cause the employer irreparable harm. See *Trustees of the Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. Rentar Indus., Inc.*, 951 F.2d 152, 154-55 (7th Cir.1991); *Central Transp.*, 935 F.2d at 118-19.

In this case, Hunt never even attempted to show that it would suffer irreparable harm if it were required to make interim payments. Under *Rentar Industries* and *Central Transport*, Central States thus had a respectable argument that Hunt could not avoid an order for interim payments regardless of any problems with Central States' notice. Ultimately, of course, we determined that if a fund's demand for payments was facially defective, we would not inquire into the harm the company would suffer from making interim payments. Nevertheless, prior to *Hunt I*, we had never found any exceptions to the two-part rule of *Rentar Industries* and *Central Transport*. Under those circumstances, one could not say that Central States lacked a substantial justification for the argument it raised in reliance on these cases.

Central States also had a significant good-faith reason for taking the position it did. Central States operates a pension fund supported by contributions from multiple employers, and when an employer defaults on its obligations to the fund, Central States' ability to pay the promised pensions to its beneficiaries may be endangered. Nevertheless, as Central States' frequent resort to this court shows, employers who have withdrawn from the fund are often recalcitrant when it comes to paying withdrawal liability. See, *e.g.*, *Central States, Southeast and Southwest Areas Pension Fund v. Bomar Nat'l, Inc.*, 253 F.3d 1011 (7th Cir.2001); *Central States, Southeast and Southwest Areas Pension Fund v. Safeway, Inc.*, 229 F.3d 605 (7th Cir.2000); *Central States, Southeast and Southwest Areas Pension Fund v. Midwest Motor Express, Inc.*, 181 F.3d 799 (7th Cir.1999). As we explained in *Central Transport*, the fund's ability to collect interim payments while the parties arbitrate the employer's ultimate liability is a critical component of the MPPAA's statutory scheme. 935 F.2d at 118. Because many employers that have withdrawn from a fund are financially unstable, the interim payments provide the fund with a needed assurance that, in the event the employer is ultimately found liable,

there will be funds available to cover the employer's liability. *Id.* Recognizing this need, Congress intentionally drafted the interim payment provisions of the MPPAA to give funds very broad power to demand interim payments, *id.*, and the funds have an obligation to their constituents to try to keep that power as broad as required to meet the statutory purposes.

From the perspective of the employer, the difference between having to pay based on a premature notice and being able to wait until the fund issues a proper notice may be insignificant—a few months of payments at the most. Given the number of withdrawal liability notices the fund sends out in any given year, however, the delay in payment during those few months could quickly add up to substantial losses for the fund. In addition, although the district court found that there was no legitimate dispute over the appropriate withdrawal date in this case, withdrawal dates are often difficult to compute with precision, which means that the fund had a substantial interest in arguing for a rule that would not penalize it for occasional miscalculations. For these reasons, we believe Central States had a significant, good-faith reason for litigating this case.

Once it is established that Central States' position in this case was substantially justified and taken in good faith, the district court's concern that an award of fees was necessary to deter similar conduct by funds in future cases loses much of its force. Although Central States' position in this case was substantially justified, now that we have answered the legal question, a similar argument in a future case would lack merit.

In closing, we stress that we are not holding that an award of fees could never be appropriate in an interim payments case. Rather, as we have repeatedly held, the district court must evaluate a fee request on the basis of all the circumstances of the case. In the unique circumstances of this case, however, we find that an award of fees to Hunt

would be unjust, and that the district court accordingly abused its discretion in making that award. The judgment of the district court is REVERSED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 96 C 5634
Judge John A. Nordberg

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,

Plaintiffs,

v.

HUNT TRUCK LINES, INC.,

Defendant.

ORDER

Plaintiffs Central States, Southeast and Southwest Areas Pension Fund and Howard McDougall (collectively "Central States") filed an action under ERISA to collect interim withdrawal liability payments. On January 12, 1999, this court entered an order granting summary judgment in favor of defendant Hunt Truck Lines, Inc, ("Hunt"), finding that Central States prematurely issued its Notice and Demand for Payment of Withdrawal Liability before the applicable liability-triggering withdrawal had even taken place. Currently before the court is Hunt's motion for attorneys' fees pursuant to 29 U.S.C. § 1132(g)(1).

The parties agree on the applicable standards. This court has the discretion to grant Hunt, who indisputably was the prevailing party, reasonable attorneys' fees. The Seventh Circuit has used two different tests to determine whether

reasonable attorneys' fees should be awarded in this context. First, under the "five factor" test, the court analyzes the following factors:

> (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter others from acting under similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions.

Meredith v. Navistar Int'l Transp. Corp., 935 F.2d 124, 128 (7th Cir.1991) (quoting *Operating Eng'rs Pension Trust v. B&E Backhoe, Inc.*, 911 F.2d 1347, 1357 (9th Cir.1990)).

Second, under the "substantially justified" test, the court simply asks whether the position of the losing party was "substantially justified" or whether "special circumstances make an award unjust." *Id.* The Seventh Circuit has described this test as follows:

> These words create a modest presumption (modest because of the "special circumstances" exception) in favor of awarding reasonable attorney's fees to the winning party, plaintiff or defendant, unless the loser's position, while rejected by the court, had a solid basis—more than merely frivolous, but less than meritorious.

Id. (quoting *Bittner v. Sadoff & Rudoy Indus.*, 728 F.2d 820, 830 (7th Cir.1984)). Ultimately, in *Meredith*, the Seventh Circuit stated that, "[w]hichever approach is used, the bottom-line question is essentially the same: was the losing party's position substantially justified and taken in good faith, or was that party simply out to harass its opponent?" *Id.*

Both sides here argue they should win under either test, although Central States favors the "substantially justified" test and Hunt favors the "five-factor" test. Under both of these tests, this court finds that Hunt should receive reasonable attorneys' fees. The facts of this case, and this court's ruling on the motion for summary judgment, are set forth in the January 12, 1999 order and will not be repeated here.

This court finds that fees are warranted largely because Central States was culpable in "jumping the gun" and prematurely issuing the Notice for Demand. The initial culpability was exacerbated by the continued insistence on this position in this litigation.[1] Simply stated, Central States could have terminated this case and re-issued a valid notice and demand. An award of attorneys' fees will serve to deter such culpable behavior and will serve to heighten the concern for adhering to the statutory framework, which, as we previously have noted, gives Central States (and others like it) a significant power to unilaterally demand interim payments.

Central States' only real argument against the award of fees is that the arbitrator and later Judge Shadur concluded that Hunt was liable for final withdrawal liability payments. The focus of those rulings, however, was not on the question of *interim* withdrawal liability, even though those decision-makers did make some comments on the fact that Central States prematurely issued its notice and demand. As Judge Shadur recognized, different concerns are at issue between interim and final withdrawal liability. *Central States v. Hunt Truck Lines, Inc.*, 43 F. Supp. 2d 942, 948 n.6 (N.D. Ill.1999) (noting that this court's January 12, 1999 order "addressed only interim liability" and therefore "need not impact" Judge Shadur's review of the arbitration award). Moreover, the

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[1] In an effort to avoid the argument that it prematurely issued the notice, Central States also contradicted its own affidavit concerning the issue of the withdrawal.

arbitrator confirmed the fact that Central States prematurely issued its notice and demand, and he ordered Central States to issue a revised demand and payment schedule to Hunt. At a minimum, Central States itself states that it committed an "error" in the issuance of the notice and demand. In sum, under the facts in this case, it is not illogical for Central States to not have been able to recover interim withdrawal liability payments, yet to later have recovered final withdrawal liability payments.

This court previously instructed the parties to brief only the issue of whether attorneys' fees should be awarded, reserving for later (if necessary) the question of what amount of fees are reasonable. Now that this court has ruled that fees are warranted, it will set the following briefing schedule on the question of the amount of fees. Hunt is directed to file an opening brief and supporting affidavits on or before October 15, 1999. Central States may file a response on or before November 5, 1999, and Hunt may file a reply on or before November 19, 1999. This court will issue its ruling by mail.

ENTER:

/s/ John A. Nordberg
JOHN A. NORDBERG
Senior United States District Court Judge

DATED: 9/24/99

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

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Case Number: 1:96-cv-05634

CENTRAL STATES PHWFd,

v.

HUNT TRUCK LINES INC.

Assigned Judge: Honorable John A. Nordberg

MINUTE ORDER of 9/24/99 by Hon. John A. Nordberg: Hunt is directed to file an opening brief and supporting affidavits on or before 10/15/99. Central States may file a response or before 11/05/99, and Hunt may file a reply on or before 11/19/99. This court will issue its ruling by mail. (Entered Order). Mailed notice

This docket entry was made by the Clerk on September 28, 1999.

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APPENDIX C

UNITED STATES DISTRICT COURT
N.D. Illinois
Eastern Division

[Filed Oct. 26, 2000]

No. 96 C 5634

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*

Plaintiffs,

v.

HUNT TRUCK LINES, INC.,

Defendant.

ORDER

NORDBERG, *Senior District Judge.*

Before the court are three requests for attorneys' fees and non-taxable costs pursuant to 29 U.S.C. § 1132(g)(1) filed by defendant Hunt Truck Lines, Inc. ("Hunt"). The first request was filed after this court granted summary judgment in favor of Hunt. *See Central States, Southeast And Southwest Areas Pension Fund v. Hunt Truck Lines, Inc.*, 70 F.Supp.2d 840 (N.D.Ill.1999). This court first ruled that fees should be awarded to Hunt pursuant to this request, and then ordered the parties to brief the issue of what amount of fees were reasonable. *See* 9/24/99 Order.

Around the time the first fee request was filed, Central States filed a notice of appeal of this court's order granting summary judgment. The appeal was consolidated with the appeal of a related case before Judge Shadur, involving these same parties. Before this court issued a final ruling on the first request, the Seventh Circuit issued its ruling in the

consolidated appeal, affirming this court's order granting summary judgment to Hunt. *See Central States, Southeast And Southwest Areas Pension Fund v. Hunt Truck Lines, Inc.*, 204 F.3d 736 (7th Cir.2000). Hunt then filed its second fee request, labeled as a "supplemental" request, which seeks fees related to the appeal and to the preparation of the first two fee requests.

I. The First Fee Request.

As noted above, we have already ruled that reasonable fees and costs should be awarded on the first request, which relates to the litigation in the district court. Hunt seeks $44,120 in attorneys' fees and $1,222.22 in non-taxable costs, and has filed affidavits from its lead and local counsel as well as copies of monthly invoices from each firm.[1] In attempting to calculate non-taxable costs, Hunt states that it had difficulty segregating those costs attributable to this case from those costs attributable to the related case before Judge Shadur. To account for this problem, Hunt used a formula. It first added up the total costs by taking only those costs billed in the months in which counsel also billed time to this case. It then discounted that total by 80% to account for the possibility that some costs not attributable to the litigation may have been included.[2]

In its response brief, Central States does not challenge the reasonableness of the various attorneys' hourly billing rates and only raises a few, modest objections to the specific requests for fees and costs. The objections are as follows: (1) attorneys' fees for meetings and telephone conferences in which more than one of Hunt's attorneys were present; (2) computerized legal research; (3) certain duplicative requests;

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[1] Non-taxable costs include postage, telephone charges, travel expenses, facsimile charges and courier and express delivery charges.

[2] Hunt apparently applied this 80% reduction formula only to the those costs billed by lead counsel and not to those billed by local counsel.

and (4) secretarial overtime. With the exception of secretarial overtime, we do not believe that these objections are warranted.

First, Central States argues that—as a general rule—Hunt should not be allowed to recover for *any* meeting or telephone conference in which two or more of its attorneys were present. We disagree. Hunt has provided a reasonable explanation. It says that its counsel employed a team concept to the overall litigation, with attorneys working on separate projects, or on separate sections of the same project. Along this line, we agree with the comments made by one district court, which rejected the same argument Central States is making here:

> Having several attorneys attend the same meeting or participate in the same conference call promotes the exchange of different perspectives on a particular legal strategy and decreases the possibility of some misunderstanding arising at a later date. Indeed, where a number of different attorneys are working on the same matter, arranging for most or all of them, rather than just one of them, to sit in on a conference may be more efficient, as it avoids the one attendee having to repeat what was said to colleagues also working on the case.

Emmenegger v. Bull Moose Tube Co., 33 F.Supp.2d 1127, 1139 (E.D.Mo.1998). Because Central States has not offered any specific reason for rejecting the particular time entries other than this general rule, we will not reduce the fees based on this objection.

Second, Central States argues that computerized legal research expenses (*i.e.* Westlaw and Lexis charges) are overhead that may only be recovered as part of the attorney's hourly fee. Central States has not cited to any Seventh Circuit case to support this argument, and it has not disputed Hunt's assertion that its counsel routinely bills its clients

separately for such computer research. *See generally Uniroyal Goodrich Tire Co. v. Mut. Trading Corp.*, 63 F.3d 516, 526 (7th Cir.1995) (rejecting the argument that computerized legal research expenses should be included as overhead). Therefore, we find that this objection is without merit.

Third, Central States argues that certain specific requests are duplicative or are not—recoverable. For example, it says that in certain instances Hunt's local counsel and its primary counsel billed for the same costs. In its reply brief, Hunt has either provided an adequate explanation why certain entries in fact are not duplicative as they appear to be or instead has agreed to reduce its fee request to account for the duplication. Thus, this issue has been addressed to our satisfaction.

Finally, Central States argues that Hunt should not be allowed to recover for secretarial overtime. Hunt argues in response that secretarial overtime can be recovered in extraordinary circumstances. However, Hunt has not sufficiently explained why the particular expenses were extraordinary. Therefore, we will not allow them.

In sum, we will reduce the non-taxable costs by $1,116.73, which consists of $1,074.57 for certain duplicative entries, $16.58 for certain non-recoverable local expenses, and $25.58 for secretarial overtime. We therefore award $44,120 in attorneys' fees and $105.49 in non-taxable costs on the first fee request.

II. The Second Fee Request.

We now turn to the second request, which consists of two parts: (i) fees relating to the appeal, and (ii) fees relating to the preparation of the two fee requests. Central States does not object in principle to the recovery of fees related to the preparation of the fee requests but believes that the particular fees and costs sought by Hunt are excessive and should be reduced. It does object, however, in principle to the recovery of any appeal-related fees based on a waiver argument

described below. Central States also argues that the appeal—related fees, if allowed, should be reduced because they are excessive.

A. Waiver Of Appeal-Related Fees.

This court previously determined that fees and costs in the first request should be awarded to Hunt under § 1132(g)(1).[3] *See* 9/24/99 Order. This court did so by applying the "five factor" and the "substantially justified" tests used by the Seventh Circuit in this context. Among other things, we found that the award was justified based on the fact that Central States was culpable in "jumping the gun" when it prematurely issued its notice for demand. On appeal, the Seventh Circuit affirmed this court's order and reasoning and noted at the end of its opinion that Central States easily could have corrected its initial premature notice for demand by issuing a second timely notice: "Why didn't Central States save everyone a big headache and pursue this course of action a long, long time ago?" *Hunt Truck Lines*, 204 F.3d at 743.

In its response brief, Central States has not directly argued that its appeal was substantially justified or that there was any special circumstance that weighs against awarding appeal-related fees and costs.[4] Instead, it relies on a more technical argument, arguing that Hunt made a procedural mis-step by failing to directly ask the Seventh Circuit for fees

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[3] This section provides that this court has the discretion to award reasonable attorneys' fees and costs to either party. 29 U.S.C. § 1132(g)(1).

[4] Even if Central States had made the argument, we would reject it under the two tests because Central States advanced the same general arguments on appeal as it did in this court. *See generally Production And Maintenance Employees' Local 504 v. Roadmaster Corp.*, 954 F.2d 1397, 1407 (7th Cir.1992) (awarding appeal-related fees based on the fact that the party "repeat[ed]" the same unjustified argument "in [the appellate] court [that] it did in the district court").

and costs when this case was pending before that court. In other words, Central States argues that Hunt can seek appeal-related fees and costs *only* from the Seventh Circuit and not from this court and that it has effectively waived its right to such fees. This rule makes sense, according to Central States, because the Seventh Circuit would have been in the "optimal position" to rule on this issue.[5]

We are not persuaded by this argument. Whether or not policy arguments may favor enacting such a rule, it is not clear to us that such a rule exists in this circuit. We are not aware of any statutory language or Seventh Circuit case or rule that requires a party in this position to seek appeal-related fees under § 1132(g) *only* from the Seventh Circuit. In fact, § 1132(g)(1) seems to have been written based on the assumption that it was the district court that would award such fees. *See generally Meredith v. Navistar Int'l Trans. Corp.*, 935 F.2d 124, 128 (7th Cir.1991) (noting that it is "normally" the district court that grants fees under § 1132(g)(1)). The only case that Central States cites to support its argument is a Tenth Circuit case—*Hoyt v. Robson Cos., Inc.*, 11 F.3d 983 (10th Cir.1993). However, *Hoyt* did not involve a request for fees under § 1132(g)(1). In sum, in light of this uncertainty, it seems unfair to hold that Hunt waived its right to seek such fees.

B. Objections To The Second Fee Request.

We now address Central States' argument that the fees and costs associated with both the appeal and the preparation of the fee requests are unreasonable and excessive. Central States mounts a two-tiered attack. It criticizes specific fees and costs on the grounds of excessiveness, duplication, or

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[5] Central States says that Hunt could have sought fees under either Fed. R. App. P. 38 or § 1132(g)(1). The Seventh Circuit's mandate did not address the issue of fees but did tax against Central States the cost of Hunt's reproduction of its briefs.

vagueness. It also generally criticizes the total amount of post-judgment fees, arguing that it is grossly disproportionate when compared to the total amount of fees sought for the district court action. We will analyze the specific objections first, and then turn to the more general objection.

1. Specific Objections.

In this second request, Hunt asks for $102,427 in supplemental attorneys' fees and $2,554.30 in supplemental non-taxable costs. As it did in its first request, Hunt has submitted copies of its counsels' monthly invoices, which contain a description of the legal work done and costs. In its response brief, Central States sets forth number of objections to specific entries on these invoices. Its chief criticism is that Hunt did not account for the fact that the appeal in this case was consolidated with the appeal of the related case before Judge Shadur.

With regard to attorneys' fees, we do not need to address most of Central States' objections because Hunt in its reply brief has agreed to reduce its request to account for them. As to the remaining objections concerning attorneys' fees, we do not agree with the argument made by Central States and instead are satisfied with the explanation provided by Hunt. For example, as to the vagueness of certain entries, Hunt has provided additional description. As to other criticisms, such as computerized legal research, we have already ruled against Central States in Section I above.

As to costs, we find that certain of Central States' objections have merit, although altogether they only result in a very modest reduction in the overall reward. As we have noted above, we do not believe that secretarial overtime is justified in this case. In addition, as more fully explained in Central States' response brief, there are certain other costs that are not justified because they are not substantiated, vague, or generally not recoverable.

For lead counsel, the following costs will not be allowed: (1) March 17, 1999 invoice—travel expenses ($103.37); (2) May 14, 1999 invoice—photo copy expenses ($152.25), secretarial overtime ($193.62), travel expenses ($30), and airfare expenses ($272); (3) June 18, 1999 invoice; airfare expenses ($228) and taxi expenses ($155); and (4) December 7, 1999—secretarial overtime ($38.96). Because these costs were already discounted by 80% under the formula used by Hunt, we will therefore reduce this total ($1173.20) by 80%, leaving $234.64.

For local counsel, the following costs will not be allowed: (1) March 1, 1999 invoice—auto rental ($101.71) and additional secretarial assistance ($88.71); (2) April 1, 1999 invoice—cab fare ($32) and court reporter ($65); (3) May 1, 1999 invoice—cab fare ($26); (4) June 1, 1999 invoice—cab fare ($4), court reporter ($95), filing fees ($105), and previously issued check voided ($39); and (5) July 1, 1999 invoice—additional secretarial assistance ($103.16). The 80% reduction formula was not previously applied to these costs. Therefore, we will subtract their total amount ($659.58) from the overall costs. Combining these two amounts ($234.62 plus $659.58) results in a reduction of $894.22 from the costs sought by Hunt.[6]

With these modifications, Hunt's second fee request has been reduced by almost $20,000. Specifically, the amounts are: $83,032 in attorneys' fees; $1,505.82 in legal fees related to computerized legal research; and $1,358.92 in nontaxable costs.

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[6] We note that Central States, in its response brief, never listed the exact dollar amounts that corresponded to the particular time entries that it believed should be eliminated. These fee requests are already tedious enough without the added difficulty of digging through a stack of invoices looking for the specific dollar amounts and then totaling those amounts up. In short, next time Central States should "do the math," thereby saving this court valuable time.

2. A General Objection.

We now turn to the more general objection that the overall amount is too much when compared to the first request. Specifically, Central States argues that the post-judgment amount is almost twice as much as the amount for the original action in this court, which took over three years to complete. In its reply brief, Hunt points out that the $83,032 in post-judgment attorneys' fees relates to what are essentially two separate "cases"—the appeal and the fee preparation. When viewed in this manner, it says that it is only seeking (approximately) $41,500 for the appeal and $41,500 for the fee preparation, which it notes is slightly less than the $43,044.43 it has sought for the district court litigation.

We are not entirely sure how to deal with this general objection, especially given that Hunt has already agreed to the majority of the specific objections made by Central States and given that we have concluded that the remaining specific objections are not justified. With regard to the appeal-related fees, we do not find that this general objection has merit. However, with regard to the total amount sought for the preparation of the fee request, we are concerned that it is still too high despite being reduced somewhat already and despite the fact that the fee litigation did involve two rounds of briefing with several legal arguments. We therefore have reviewed those time entries, and have decided to reduce the attorneys' fee award by an additional $10,000. This results in a reduction of approximately 25% of the fees related to this segment of the case, and we think it addresses the general concern that the overall amount is excessive.[7]

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[7] Reducing the request in this lump-sum manner is admittedly an imprecise method and not one typically used by this court. However, given the way the invoices were prepared, with general descriptions of the exact work done, it is difficult to say that a particular time entry by itself is unreasonable.

III. Supplemental Briefing.

Shortly after this court had prepared its initial draft of this opinion addressing the first two fee requests, but before that opinion was issued, Central States filed a motion for leave to file a supplemental brief. The reason given for wanting to file a supplemental brief was to address the impact of the Seventh Circuit's ruling in this case. This court granted Central States leave to file a supplemental brief and also allowed Hunt to file a supplemental response.

The gist of the supplemental brief filed by Central States is that, although Hunt prevailed in this court, it merely achieved a "pyrrhic victory" because ultimately Central States will recover final withdrawal payments from Hunt in the case now before Judge Guzman, which concerns the revised withdrawal liability assessment. In other words, according to Central States, Hunt has achieved little by forestalling interim payments given that it eventually will have to make final withdrawal payments. Central States is thus re-arguing a point already decided by this court in its prior order; namely, whether Central States' position in this litigation was substantially justified. *See* 9/24/99 Order at 2; 29 U.S.C. § 1132(g)(1).

We are not persuaded by this additional argument. Central States overlooks the important distinction we have already made several times in this case between the separate questions of interim and final withdrawal liability. Thus, even if Hunt ultimately loses on the question of final withdrawal liability, that does not mean that it was not the prevailing party with regard to the question of interim liability. In short, the reasons set forth in our 9/24/99 order for awarding fees remain unchanged. What Central States really seems to be complaining about is the fact that Hunt has continued to resist liability for final withdrawal payments in the case before Judge Guzman, despite language in the Seventh Circuit's decision stating that Hunt likely would be

liable for final payments under a revised and timely demand. *See Hunt*, 204 F.3d at 743 ("In fact, it appears certain that Central States will (and should) receive the full withdrawal fee to which it is entitled."). That is a matter before Judge Guzman and, as we have said, is separate from the issue that was before this court.

We now address what, in effect, is a third request for fees. In its supplemental response brief, Hunt requests fees for being required to appear before this court on June 8, 2000 (the date Central States presented its motion for leave to file a supplemental memorandum) and for preparing the supplemental response memorandum. Hunt requests $11,100 in additional attorneys' fees.[8] It also requests $671.50 in non-taxable costs, which are the travel costs for one of the attorneys from Hunt's lead counsel to fly to Chicago for the presentment of the motion on June 8th. In contrast to its first two fee requests, Hunt has not submitted monthly invoices nor has it otherwise described the specific work done. Central States has not moved for leave to file any objections to this third request.

We have reviewed the request and conclude that $2,400 in attorneys' fees represents a reasonable amount for the work done on the supplemental briefing. This amount represents 2 hours for reviewing the motion and attending court and 10 hours for preparing the response brief. As noted above, Central States' supplemental brief largely raised issues already addressed by this court, and therefore Hunt was not required to delve into new or complicated issues in filing its response. Moreover, Hunt has not provided specific descriptions of the actual work done, making it hard to know whether the work was justified. Finally, we do not find reasonable Hunt's explanation for why it needed to have an

[8] This $11,100 figure consists of 46.5 hours billed by the lead law firm at $200 an hour ($9300) and 9 hours by local counsel also at $200 an hour ($1800).

attorney fly to Chicago for the presentment of the motion, rather than sending an attorney from its local counsel. Therefore, we will disallow the $671.50 in non-taxable costs.

CONCLUSION

For the reasons stated above, this court orders Central States to pay Hunt $44,120 in attorneys' fees and $105.49 in non-taxable costs on the first fee request; to pay Hunt $73,032 in attorneys' fees, $1,505.82 for computerized legal research, and $1,358.92 in nontaxable costs on the second request; and to pay Hunt $2,400 in attorneys' fees on the third request.

UNITED STATES DISTRICT COURT
Northern District Of Illinois
Eastern Division

Case Number: 96 C 5634

CENTRAL STATES,

v.

HUNT TRUCK LINES, INC.

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that for the reasons stated in this Court's Memorandum Opinion and Order, this Court orders Central States to pay Hunt $44,120 in attorneys' fees and $105.49 in non-taxable costs on the first fee request; to pay Hunt $73,032 in attorneys' fees, $1,505.82 for computerized legal research, and $1,358.92 in nontaxable costs on the second request; and to pay Hunt $2,400 in attorneys' fees on the third request.

Michael W. Dobbins, Clerk of Court

Date: 10/31/2000 /s/ Terry Perdue
TERRY PERDUE, Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

[Filed January 4, 2002]

No. 00-3922

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, And HOWARD MC DOUGALL, Trustee,
Plaintiffs Appellants,

v.

HUNT TRUCK LINES, INC.,
An Iowa Corporation,
Defendant-Appellee,

Appeal from the United States
District Court for the
Northern District of Illinois,
Eastern Division
No. 96 C 5634
John A. Nordberg, *Judge*.

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. ILANA DIAMOND ROVNER, *Circuit Judge*
Hon. DIANE P. WOOD, *Circuit Judge*

ORDER

On consideration of the petition for rehearing filed by counsel for the defendant-appellee on December 17, 2001, all members of the panel have voted to DENY the petition.

Accordingly, the petition for rehearing is hereby DENIED.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00-3922

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD MCDOUGALL, trustee,
Plaintiffs Appellants,

v.

HUNT TRUCK LINES, INCORPORATED,
an Iowa corporation,
Defendant-Appellee.

Appeal from the United States
District Court for the
Northern District of Illinois,
Eastern Division.
No. 96 C 5634
John A. Nordberg, Judge.

PETITION FOR REHEARING

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION AND FACTUAL AND PROCEDURAL BACKGROUND	1
ARGUMENT	
I. JUDGE NORBERG'S DECISION WAS NOT AN ABUSE OF DISCRETION	5
II. THERE ARE NO SPECIAL CIRCUMSTANCES IN THIS CASE BECAUSE HUNT TRUCK WAS NOT INVOLVED IN ANY FOOTDRAGGING DURING THE RELEVANT TIME OF THIS DECISION	7
III. THERE IS NO SUBSTANTIAL JUSTIFICATION FOR CENTRAL STATES MAINTAINING ITS POSITION BECAUSE OF THE CLEAR MANDATE OF THE STATUTE WHICH SAYS THAT NO WITHDRAWAL LIABILITY SHALL BE ISSUED UNTIL AFTER A WITHDRAWAL	8
CONCLUSION	13

TABLE OF AUTHORITIES

Cases

Page

Bowerman v. Wal-Mart Stores, Inc, 226 F.3d 574 (7th Cir. 2000)..... 5

Central States v. Hunt, 70 F. Supp. 2d 840 (N.D. Ill. 1999).....9, 11, 12

Central States v. Hunt, 204 F.3d 736 (7th Cir. 2000).....1, 2, 3, 4, 6, 7, 8, 10

Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. Rentar Indus., Inc., 951 F. 2d 152 (7th Cir. 1991).....8, 10, 11

Estate of Borst v. O'Brien, 979 F.2d 511 (7th Cir.1992)..... 5

Libby v: Illinois High School Assn., 921 F.2d 96 (7th Cir.1990).....5, 7, 12

Little v. Cox's Supermarkets, 71 F.3d 637 (7th Cir. 1995)..... 5

Miller v. Artistic Cleaners, 153 F.3d 781 (7th Cir. 1998)..... 5

Munson v. Freske, 754 F.2d 683 (7th Cir 1985).... 5

Trustees of the Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent v. Central Transp., Inc., 935 F.2d 114 (7th Cir. 1991).....8, 10, 11

Statutes

29 U.S.C. § 1381(a)..... 9, 10

29 U.S.C. § 1382..... 9, 10

INTRODUCTION AND FACTUAL BACKGROUND

Appellee Hunt Truck Lines, Inc. ("Hunt Truck") files this Petition for Reconsideration because the panel's decision conflicts with fundamental procedural due process rights provided to Hunt Truck as embodied in the Employee Retirement Income Security Act ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). The basis of this panel's decision in reversing Judge Nordberg's Orders and Judgments providing Hunt Truck with attorneys' fees and costs was that Judge Nordberg erred in failing to take into account the broader context of this litigation which was that an award of fees would do nothing but encourage the very footdragging and avoidance of interim payment liability the MPPAA was designed to prevent. Slip Op. at 5.

However, at least prior to this Court's decision in *Central States v. Hunt Truck Lines, Inc.*, 204 F.3d 736 (7th Cir. 2000) ("*Hunt I*"), there was no footdragging or avoidance of interim payment liability by Hunt Truck because this Court in *Hunt I* found that Hunt Truck previously had not been subject to an enforceable Notice and Demand awarding monetary liability to Central States.[1] *Id.* The first Notice and Demand issued by the Central States Southeast and Southwest Areas Pension Fund ("Central States") on or about May 31, 1996 was premature as this panel acknowledged and as found by this Court in *Hunt I*. *Id. at* 742.

Moreover, the revised Notice and Demand issued to Hunt Truck by Central States on July 1, 1998, while not premature, was never enforceable prior to this Court's decision in *Hunt I*

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[1] In addition, Hunt Truck is arguing in another case before this Court that the doctrine of res judicata precludes Hunt Truck from liability after this Court's decision in *Hunt I*. Thus, Hunt Truck disputes this Court's statement that ". . . there is no dispute that Hunt will ultimately face withdrawal liability." Slip Op. at 5.

because of Central States' multiple procedural errors in enforcing the revised Notice and Demand. First, in *Hunt I*, this Court acknowledged Central States failed to ask for relief in arbitration ("Central States could have returned to the arbitrator to ask for a clarification of the Demand before it went to court.") *Id.* at p. 743. Second, in *Hunt I*, this Court found Central States failed to request modification of the award before Judge Shadur. ("It [Central States] also could have raised its contention that the award necessarily included a money judgment in its pleadings.") *Id.* Therefore, in *Hunt I*, this Court concluded: "[t]o suggest that Judge Shadur should have unilaterally changed the order is a lot of baloney. The fund got what it asked for." *Id.* Thus, it would be impossible to blame Hunt Truck for any footdragging in this time period prior to this Court's decision on February 28, 2000 in *Hunt I*.

However, Judge Nordberg's initial decision awarding attorneys' fees and costs to Hunt Truck occurred before this Court's decision in *Hunt I*. On September 24, 1999, Judge Nordberg issued his Order granting Hunt Truck's motion for attorneys' fees. Short Appendix attached to Brief of Appellants, pages 16-19 hereinafter cited as "S.A. at ___." Judge Nordberg found: [u]nder both of these tests, this court finds that Hunt should receive reasonable attorneys' fees." S.A. 17. Judge Nordberg later concluded, "[t]his court previously instructed the parties to brief only the issue of whether attorneys' fees should be awarded, reserving for later (if necessary) the question of what amount of fees are reasonable." S.A. at 19. Thus, it should be clear to this Court that Judge Nordberg awarded attorneys' fees and costs to Hunt Truck five months before this Court's decision in *Hunt I*.

Judge Nordberg entered his final judgment regarding the question of what amount of fees were reasonable on October 26, 2000. S.A. 03-14. While this Order was issued eight months after *Hunt I*, substantially all of the fees and costs

awarded were for work performed prior to *Hunt I*. Judge Nordberg ordered Central States to pay Hunt Truck $44,120.00 in attorneys' fees and $105.49 in non-taxable costs on the first fee request; to pay Hunt Truck $73,032.00 in attorneys' fees, $1,505.82 for computerized legal research and $1,358.92 in non-taxable cost on the second request; and to pay Hunt Truck $2,400.00 in attorneys' fees on the third request. S.A. 01. The first fee request related to the litigation in the District Court, all of which occurred before this Court entered its decision in *Hunt I* S.A. 04. The second fee request consists of two parts: (i) fees related to the appeal; and (ii) fees related to the preparation of the two fee requests. S.A. 06. Obviously, all of the fees associated with the appeal occurred prior to the issuance of this Court's decision in *Hunt I*. The record further indicates that all of the fees associated with respect to the second fee request occurred prior to this Court's decision in *Hunt I* S.A. 10. The third request for fees concern a supplemental response subsequent to this Court's decision in *Hunt I*. S.A. 13. Judge Nordberg granted $2,400.00 in attorneys' fees associated with the third request for fees. S.A. 13. Therefore, excluding $2,400, all of the attorneys' fees and costs awarded to Hunt Truck were awarded for work performed prior to this Court's decision in *Hunt I*.

Nevertheless, the panel in this case ruled that "[d]espite the presumption in favor of awarding fees in usual cases, however, we believe that the district court erred in failing to take into account the broader context of this litigation." Slip. Op. at 4. This panel defined "broader context" as follows: "[h]ere, in the broader context of this litigation, an award of fees would do nothing but encourage the very footdragging and avoidance of interim payment liability that the statute was designed to prevent, and thus would be 'unjust.'" Slip. Op. at 5. The panel in this case further clarified that the footdragging it was concerned with occurred after this

Court's decision in *Hunt I* up until at least the date of oral argument in this case, or on May 14, 2001:

> The district court apparently felt that it was without power to consider events not directly related to the case before it. This assumption was in error. Our cases make clear that a district court considering an award of fees should take into consideration any "special circumstances" which would make an award of fees unjust, *see Meredith* 935 F 2d at 128, and that directive is broad enough to encompass consideration of pending, related litigation between the parties.
>
> Once we take this broader context into account, it becomes clear why fees would be inappropriate here. Although Hunt won this round of its battle with Central States, [*Hunt I*] as far we can tell from the record, there is no dispute that Hunt will ultimately face withdrawal liability. Nevertheless, Hunt has continued to refuse to make payments to Central States, and as of the date of oral argument in this case [May 14, 2001] has not paid anything. The fact that Hunt has now managed to put off making its first payment on its liability for several years confirms our suspicion that Hunt's primary motivation in this case was not to force Central States to issue a new demand notice revising the withdrawal date by a few months (which Central States has long since done) but to delay paying its withdrawal liability for as long as possible. In the fact of Hunt's abstinence, it would be unjust to require Central States to pay Hunt over $100,000.

Slip Op. at 5 (emphasis added).

How could this Court reverse Judge Nordberg's decision awarding Hunt Truck fees and costs on the basis that he failed to take into account events that occurred in the future, after he issued his decision?

In addition, this Court in *Hunt I* already identified Central States as the party at fault for extending this litigation for more than three years from September 1996 until February 2000:

> Happily, that's all we need to know to handle the Fund's [Central States'] appeal. Central States could have returned to the arbitrator to ask for a clarification of the demand before it went to court. It also could have raised its contention that the award necessarily included a money judgment in its pleadings. Instead it went to court the day after the arbitrator's decision came down and simply asked that the award be affirmed. We have held that an arbitrator's findings of law should only be disturbed by a review in court if they appear to be arbitrary and capricious or otherwise not in accordance with the law. To suggest that Judge Shadur should have unilaterally changed the order is a lot of baloney. The Fund got what it asked for.

Id. at 743 (citations omitted). Reversing Judge Nordberg's decision, which awarded attorneys' fees and costs to Hunt Truck for being forced to defend itself from poor litigation, flies in the face of Hunt Truck's right to defend itself with valid defenses provided by MPPAA and general law.

Thus, the panel's decision in this case is incorrect because it is based on events which occurred after Judge Nordberg's award of attorneys' fees in his Order on September 24, 1999. S.A. 16-19. His later Order on October 26, 2000 was limited to determining what amount of fees were reasonable. S.A. 03. Therefore, it makes no sense to reverse Judge Nordberg's award of attorneys' fees and costs on the basis of facts and events which had not yet occurred.

ARGUMENT

I. JUDGE NORDBERG'S DECISION WAS NOT AN ABUSE OF DISCRETION.

This Court reviews a district court's decision to award attorneys' fees for an abuse of discretion. *Bowerman v. Wal-Mart Stores Inc.*, 226 F.3d 574 (7th Cir. 2000). This Court has held that "[a]n abuse of discretion generally only occurs where no reasonable person could take the view adopted by the trial court. . . . If reasonable persons could differ, then the appellate court will not be able to find an abuse of discretion." *Libby v. Illinois High School Ass'n.* 921 F.2d 96, 98 (7th cir. 1990) (emphasis added) (citing *Munson v. Friske* 754 F.2d 683 (7th Cir.1985); *see also Little v. Cox's Supermarkets*, 71 F.3d 637 (7th Cir.1995).

This Court has found that it owes a high degree of deference to a district court's determination of whether to award attorney's fees for three reasons:

> First, the district court has a "superior understanding of the litigation and [we] desir[e] to avoid [] frequent appellant review of what are essentially factual matters." Second, the need to achieve uniformity in attorney's fees awards is not so compelling as to justify a high level of scrutiny. Finally, deference assists us in avoiding satellite litigation solely on fees.

Miller v. Artistic Cleaners, 153 F.3d 781, 784 (7th Cir. 1998) (emphasis added) (inner citations omitted); *see also Estate of Borst v. O'Brien*, 979 F.2d 511, 514 (7th Cir.1992) ("We can think of few matters more wasteful of judicial resources than ancillary litigation over an attorneys' fee award.")

Judge Nordberg issued his Order awarding attorney fees to Hunt Truck on September 24, 1999, reserving for later the question of what amount of fees were reasonable. S.A. 19. Judge Nordberg issued his Order determining what amount of

fees were reasonable on October 26, 2000 (S.A. 14) and memorialized this Order into a Judgment on October 31, 2000. S.A. 01. Judge Nordberg would have issued this second Order many months before October 26, 2000 except for Central States filing a motion for leave to file a supplemental brief, which was granted. S.A. 12. Clearly, therefore almost all but $2,400 in attorneys' fees granted for the third fee request for defending this supplemental brief was for work performed prior to this Court's decision in *Hunt I*.

In his order of October 26, 2000, Judge Nordberg ordered Central States to pay Hunt Truck $44,120.00 in attorneys' fees and $105.49 in non-taxable costs on the first fee request; to pay Hunt Truck $73,032.00 in attorneys' fees, $1,505.82 for computerized legal research, and $1,358.92 in non-taxable costs on the second fee request. S.A. at 02. This totals $120,122.23 and was for work performed prior to this Court's decision in *Hunt I* on February 28, 2000.

How can this Court possibly find that Judge Nordberg abused his discretion in awarding attorney fees and costs on September 24, 1999 (S.A. 16-19) for work performed prior to February 28, 2000 (date of this Court's decision in *Hunt I*), because Hunt engaged in footdragging after this Court's decision in *Hunt I* on February 28, 2000? Slip Op. 5. It is incomprehensible that this Court could reverse judge Nordberg's decision on the basis that Judge Nordberg failed to take into account events that had not yet occurred.

Further, Hunt Truck does not comprehend how this Court could determine that no reasonable person could have taken the position of Judge Nordberg and rule on facts that in fact occurred before the time of his decision and were properly before him. In effect, this Court criticized Judge Nordberg because of his inability to take future facts into account. Clearly, reasonable persons could take the view adopted by Judge Nordberg. *Supra*, *Libby* at 98. For this reason alone, this Court should reconsider its decision, affirm Judge

Nordberg's decision and award Hunt Truck $120,122.23 for the first and second fee request.

II. THERE ARE NO SPECIAL CIRCUMSTANCES IN THIS CASE BECAUSE HUNT TRUCK WAS NOT INVOLVED IN ANY FOOTDRAGGING DURING THE RELEVANT TIME OF THIS DECISION.

In its decision, this panel stated that "our cases make clear that a district court considering an award of fees should take into consideration any 'special circumstances' which would make an award of fees unjust, *see Meredith*, 935 F.2d at 128, and that directive is broad enough to encompass consideration of pending, related litigation between the parties" Slip Op. at 5.

However, Judge Nordberg issued his initial ruling awarding fees and costs on September 24, 1999. S.A. 16-19. Thereafter, he only determined the amount of fees and costs that were reasonable in an Order entered on October 26, 2000 for all work, except for $2,400, performed before *Hunt I*. S.A. 03-14. When Judge Nordberg entered his initial finding that an award of fees was justified, this Court had not yet issued its decision in *Hunt I*. Further, this Court in *Hunt I* affirmed Judge Nordberg's reasoning in granting Hunt Truck's Motion for Summary Judgment. *Supra*, at 742. The Court of Appeals noted at the end of its opinion that Central States easily could have corrected its initial premature notice and demand by issuing a second timely notice:

> Why didn't Central States save everyone a big headache and pursue this course of action a long, long time ago?

Hunt I at 743. Therefore, this Court made clear that, at least until this Court issued its decision in *Hunt I* on February 28, 2000, any fault with protracting this litigation and foot-dragging rested with Central States.

Clearly, Hunt Truck cannot be accused of footdragging prior to this Court's decision in *Hunt I* on February 28, 2000. Moreover, Judge Nordberg issued his determination that the fees should be awarded to Hunt Truck five months earlier in September, 1999. S.A. 16-19. Thus, there were no special circumstances of footdragging prior to this Court's decision in *Hunt I* that warrant this Court's reversal of Judge Nordberg's decision. Moreover, substantially all of the work for which Judge Nordberg awarded attorneys' fees and costs was performed prior to *Hunt I*.

Therefore this Court should reconsider its decision and affirm Judge Nordberg's earlier decision awarding fees and costs to Hunt Truck. Judge Nordberg cannot not be faulted for not taking into account events that occurred after his order awarding attorneys' fees.

III. THERE IS NO SUBSTANTIAL JUSTIFICATION FOR CENTRAL STATES MAINTAINING ITS POSITION BECAUSE OF THE CLEAR MANDATE OF THE STATUTE WHICH SAYS THAT NO WITHDRAWAL LIABILITY SHALL BE ISSUED UNTIL AFTER A WITHDRAWAL.

In this panel's decision, this Court found that it could not criticize Central States as lacking substantial justification for the arguments it raised in reliance on this Court's prior decisions in *Trustees of the Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) v. Central Transp., Inc.*, 935 F.2d 114, 118 (7th Cir. 1991) and *Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. Rentar Indus., Inc.*, 951 F.2d 152, 154-55 (7th Cir. 1991). This Court stated:

> The provisions of the MPPAA that give pension plans the right to demand interim payments of withdrawal liability are quite broad and the general rule is that the plan is entitled to receive interim payments while the

> parties arbitrate the employer's ultimate withdrawal liability. *See, e.g., Trustees of the Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. Central Transp., Inc.*, 935 F.2d 114, 118 (7th Cir.1991).

Slip Op. at 2.

* * * *

> In fact, the issues that Central States was litigating were more complex than the district court acknowledged and its position, was, even if not ultimately a winning one, substantially justified. In several cases prior to *Hunt I*, we stressed that under the MPPAA an employer is required to make interim payments at the fund's request in almost all cases. It therefore followed, we've said, that we would refuse to order interim payments only if the employer could show both (1) that the fund did not have even a colorable claim on the merits of its assessment of liability, and (2) that making the interim payments while the claim's merits are arbitrated would cause the employer irreparable harm. (citations omitted)

Sip Op. at 6.

* * * *

> Central States thus had a respectable argument Hunt could not avoid an order for interim payments regardless of any problems with Central States' Notice. . . . Nevertheless, prior to *Hunt I*, we had never found any exceptions to the two-part rule of *Rentar Industries* and *Central Transport*. Under those circumstances, one could not say that Central States lacked a substantial justification for the argument it raised in reliance on these two cases.

Slip Op. 6-7.

Thus, this panel found that the law before *Hunt I* essentially favored the position that Central States took and,

therefore, the district court could not criticize Central States' position as lacking substantial justification for its arguments.

To the contrary, however, Judge Nordberg found that the statute in question, particularly 29 U.S.C. §§ 1381(a) and 1382 "clearly reflect a statutory scheme whereby the trustees of a plan must first wait until a withdrawal has occurred before issuing notice." *Central States v. Hunt*, 70 F. Supp. 2d 840, 844 (N.D. IL. 1999). The two sections that Judge Nordberg referred to clearly reflect that a withdrawal must precede a Notice and Demand. Section 1381(a) provides:

> if an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

29 U.S.C. § 1381(a) (emphasis added). Section 1382 provides:

> when an employer withdraws from a multiemployer, the plan sponsor in accordance with this part shall—
>
> (1) determine the amount of the employer's withdrawal liability,
>
> (2) notify the employer of the amount of the withdrawal liability, and
>
> (3) collect the amount of the withdrawal liability from the employer

29 U.S.C. § 1382 (emphasis added).

Thus, a clear reading of the statute would inform Central States that it should not issue a Notice and Demand prior to the occurrence of a withdrawal. As noted by this Court in its decision, "Central States' frequent resort to this court" shows Central States did not need case law to inform it of this statutorily-imposed scheme and a common-sense fact. Slip Op. at 7.

Therefore, Judge Nordberg was correct in finding that Central States did not have substantial justification for

continuing to argue its position in the face of clear language to the contrary when, for a period of more than four years, a simple voluntary retraction of this premature Notice and Demand followed by the reissuance of a Notice and Demand (between May 31, 1996 and date of decision on January 14, 1999) could have resolved this matter. *Hunt I* at 743.

Judge Nordberg also rejected Central States' reliance on the well-established case law underlying the "pay now, dispute later" scheme contained in *Rentar* and in *Central Transport*, finding that Central States' reliance on the law contained in those cases irrelevant to the facts of the case before him:

> This court recognizes the reasons behind and the case law supporting, the general "pay now, dispute later" scheme. However, the issue in this case—whether a fund may jump the gun and issue notice before withdrawal liability has occurred—is different in kind and one that is a jurisdictional prerequisite. As such, this Court finds that proper and timely notice is a precondition for the triggering of the duty to make interim withdrawal liability payments. This is not a case where the court is attempting to "examin[e] the employer's probability of success" before the arbitration takes place. *Central Transport*, 935 F.2d at 119, but is instead one where this court is ensuring that the fund has complied with the procedural requirements of the MPPAA.

Supra, Central States v. Hunt (N.D. Ill.) at 845-46 (emphasis added). Judge Nordberg held that the clear procedural requirements of the MPPAA required that Central States first determine that a withdrawal has occurred before it issues a Notice and Demand for Withdrawal Liability. Therefore, the clear language contained in the statute defeats any argument that Central States had substantial justification in making its arguments based on the "pay now, dispute later" rationale contained in *Central Transport* and *Rentar*, which Judge Nordberg found irrelevant to the facts in this case.

Further, Judge Nordberg based his September 24, 1999 attorneys' fee award on the following facts:

> This court finds that fees are warranted largely because Central States was culpable in "jumping the gun" and prematurely issuing the notice for demand. The initial culpability was exacerbated by the continued insistence on this position in this litigation.[2] Simply stated Central States could have terminated this case and reissued a valid notice and demand. An award of attorneys' fees will serve to deter such culpable behavior and will serve to heighten the concern for adhering to the statutory framework, which as we previously have noted, give Central States (and others like it) a significant power to unilaterally demand interim payments.
>
> [2] In an effort to avoid the argument that it prematurely issued the notice Central States also contradicted its own affidavit concerning the issue of the withdrawal.

S.A. 17-18. Under these circumstances, therefore, this Court cannot find that no reasonable person could take the view adopted by Judge Nordberg. *Supra*, *Libby* at 98. Central States did not have substantial justification to maintain its position, as Judge Nordberg so found.

Finally, Judge Nordberg held:

> Under the MPPAA a fund is given the unilateral right to initiate the payment process simply by issuing a notice and demand after a statutorily-defined withdrawal has occurred. This court believes that along with this right the fund should have a responsibility to proceed in the proper statutory manner.

Supra, Central States v. Hunt, (N.D. 111.) at 846. Requiring Central States "to proceed in the proper statutory manner" defeats any argument that Central States had a substantial justification for its steadfast reliance on its "pay now, dispute later" statutory scheme in the face of clear statutory language

to the contrary. In addition, Judge Nordberg found that reliance on the "pay now, dispute later" argument was irrelevant because "the issue in this case—whether a fund may jump the gun and issue notice before withdrawal liability has occurred is different in kind and one that is a jurisdictional prerequisite." *Id.*, at 845-46. Under these circumstances, Central States had no substantial justification for refusing to budge from its arguments.

Under an abuse of discretion standard, this Court cannot determine that no reasonable person could have taken the view of Judge Nordberg. Accordingly, this Court should reconsider its decision and affirm Judge Nordberg's judgment and award attorneys' fees and costs to Hunt Truck.

CONCLUSION

For all the foregoing reasons, this Court should reconsider its decision and affirm Judge Nordberg's order of September 24, 1999 awarding attorney fees and costs to Hunt Truck and Judge Nordberg's judgment of October 31, 2000 determining the amount of fees and costs.

Dated: December 17, 2001.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that he served a copy of the PETITION FOR REHEARING, attached hereto upon counsel listed below, by depositing the same in the U.S. Mail, postage prepaid, before 5:00 p.m. this 17th day of December, 2001.

JOHN J. FRANCZYK, Esq.
ROBERT A. COCO, Esq.
CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND
Central States Law Department
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/s/ Mark A. Spognardi
MARK A. SPOGNARDI
One of Defendant's Attorneys

APPENDIX F

UNITED STATES DISTRICT COURT
N.D. ILLINOIS, EASTERN DIVISION
March 26, 2001

No. 00 C 1204

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, AND HOWARD MCDOUGALL, trustee,
Plaintiffs,

v.

HUNT TRUCK LINES, INC.,
an Iowa corporation,
Defendant.

MEMORANDUM OPINION AND ORDER

GUZMAN, J.

Pending are the parties cross motions for summary judgment pursuant to Fed. R. Civ. Proc. 56. For the reasons set forth below Plaintiff Central States, Southeast and Southwest Areas Pension Fund and its Trustee motion for summary judgment is granted (# 8-1) and Defendant Hunt Truck Lines, Inc.'s cross motion denied.(# 31-1).[1]

BACKGROUND FACTS

This case presents the third federal district court complaint filed by Central States, Southeast and Southwest Areas Pension Fund ("Central States") to collect secondary withdrawal liability incurred by Hunt as a result of Wintz Parcel Drivers, Inc. ("Wintz") filing of Chapter 7 bankruptcy. In

[1] Pursuant to Hunt's motion for oral argument the parties appeared before this Court to orally argue the merits of their cross motions.

1994 Hunt sold its assets to Wintz and stopped making contributions to the fund. Ordinarily this would require Hunt to pay a withdrawal fee. However, since the sale to Wintz satisfied the statutory requirements of 29 U.S.C. § 1384(a)(1)(C), Hunt avoided payments as long as Wintz made the required contributions. In other words, Hunt became secondarily liable—if Wintz withdrew and failed to pay a withdrawal fee, within five years of Hunt's sale of assets.

On June 3, 1996 Hunt received a notice and demand from Central States requesting $303,372.75 in withdrawal liability. The fund claimed that Hunt's liability was triggered because Wintz had "effected a complete withdrawal." Hunt refused to pay. On September 6, 1996, Central States filed a lawsuit against Hunt demanding interim withdrawal liability payments. The case was assigned to the Honorable John A. Nordberg. Central States argued that the Multiemployer Pension Plan Amendments Act (MPPAA) required Hunt to make interim payments pending the outcome of the arbitration. Hunt, on the other hand, asserted that Central States was premature in demanding payment before Hunt's secondary liability for the withdrawal payments was triggered, *i.e.*, before Hunt's successor, Wintz, affected a withdrawal. On January 12, 1999, Judge Nordberg granted Hunt's Motion for Summary Judgment finding that Central States sent the May 31, 1996 Notice and Demand to Hunt prematurely. The Court held that Central States could not recover interim withdrawal liability payments under the May 31, 1996, Notice and Demand because Central States failed to comply with the statutory prerequisites of the MPPAA in that it's notice and demand were premature.

At the same time, on December 20, 1996, Hunt commenced arbitration proceedings to contest the underlying fee assessment. The arbitration was held before Arbitrator Ira F. Jaffe, Esq. On June 23, 1998, Arbitrator Jaffe also concluded that Hunt had been billed prematurely and issued an interim

award containing the affirmative order directing Central States to issue a revised demand and directed the Parties to "begin anew the demand, request for review and arbitration processes." On July 1, 1998, pursuant to the Interim Award, Central States issued a revised Notice and Demand for Withdrawal Liability against Hunt setting forth a principal due in the same amount as in the original Demand for the same complete withdrawal by Hunt from Central States. On October 14, 1998, the Interim Award was converted to a Final Award upon the Stipulation by Central States and by Hunt that Wintz, the purchaser of Hunt's assets, effected a complete withdrawal from Central States on July 27, 1996. The final award by the arbitrator, however, strangely did not specifically require Hunt to actually make any withdrawal liability payments to Central States.

Apparently overlooking this rather significant anomaly in the arbitration award, on October 15, 1998, Central States filed its second action under ERISA Section 4221(b)(2), 29 U.S.C. § 1401(b)(2), seeking enforcement of the arbitration award based on the July 1, 1998, revised Demand and for collection of withdrawal liability under the July 1, 1998 revised Demand. This complaint was assigned to the Honorable Milton Shadur. The complaint sought to affirm and enforce Arbitrator's Jaffe's Final Award in this matter, and enter judgment against Hunt in accordance therewith and in favor of the Pension Fund, to grant the Pension Fund its costs and attorneys' fees in this action; and to grant the Pension Fund such other and further relief as this Court deems appropriate.

On February 24, 1999, Central States filed its Motion for Summary Judgment requesting the Court (Judge Shadur) to enforce the arbitration award and grant Central States its withdrawal liability assessed under the July 1, 1998, revised Demand. In its memorandum in support of its Motion for

Summary Judgment, Central States argued that Arbitrator Jaffe properly directed Central States to issue a revised Demand to Hunt instead of voiding the assessment and starting anew.

On April 8, 1999, Judge Shadur entered judgment enforcing the arbitration award. Judge Shadur held that "Arbitrator Jaffe acted fully within his arbitral authority when, instead of voiding the assessment completely, he directed the Fund to issue a (July 1, 1998) revised demand and payment schedule to Hunt." In discussing the basis for his decision Judge Shadur noted in footnote 6 the following "Judge Nordberg's January 1999 opinion held that Hunt was not required to pay interim withdrawal liability payments while the arbitration was pending because the Fund has issued its notice and demand too soon. That somewhat novel decision not to hold hunt to ERISA's statutorily prescribed "pay now, dispute later" procedure need not impact this review of the Award. That opinion addressed only interim withdrawal liability and did not review Arbitrator Jaffe's decision dealing with Hunt's ultimate withdrawal liability." On April 26, 1999, apparently now cognizant of the fact that the arbitrator's award failed to provide for payment to it of money, Central States filed a Motion To Amend Judgment before Judge Shadur seeking an amendment of his judgment to provide for a monetary judgment in favor of Central States in the principal amount of the withdrawal liability. In its Motion to Amend Judgment, Central States stated: "[t]he Court should amend the Judgment to provide for Judgment in favor of the Pension. Fund in the principal amount of the withdrawal liability owed by Hunt pursuant to the revised demand . . ." In a Minute Order dated May 21, 1999, Judge Shadur denied Central States Motion to Amend Judgment. In a hearing on this matter on May 21, 1999, Judge Shadur said that Central States' request for modification was not appropriately before him in a Motion to Amend Judgment because the sole subject of the litigation was the enforcement of the arbitration award. Judge Shadur

noted that there was no modification sought by either side which is, of course, what the ERISA statute would have permitted.Judge Shadur further noted in open court "my understanding has always been that when you get an arbitration award and the party says "Enforce it, the power of the Court is limited to saying, Yes, the arbitrator was right or no, the arbitrator was wrong." (TR. P. 6, Lines 19-22).

On May 6, 1999, Hunt appealed Judge Shadur's judgment enforcing the arbitration award. On June 30, 1999, Central States moved to consolidate its appeal of Judge Nordberg's decision to the Seventh Circuit with its appeal of Judge Shadur's judgment and denial of Central States' Motion to Amend Judgment. On July 12, 1999, the United States Court of Appeals for the Seventh Circuit issued an Order consolidating the Central States' appeals from Judge Nordberg's summary judgment decision of January 12, 1999 and from Judge Shadur's denial of Central States' Motion to Amend Judgment of May 21, 1999.

On February 28, 2000, the United States Court of Appeals for the Seventh Circuit affirmed Judge Norberg's decision as well as Judge Shadur's rulings. In so doing it found, among other things, that the arbitrator's opinion assumed that Central States would eventually collect the withdrawal liability in the amount it originally assessed. Admittedly, however, it was not clear to the court how the arbitrator envisioned that this would happen since his award did not specifically include the payment of any money. The Seventh Circuit's opinion goes on to point out that "Central states could have returned to the arbitrator to ask for a clarification of the demand before it went to court. It also could have raised its contention that the award necessarily included a money judgment in its pleadings before Judge Shadur. Instead, it went to court the day after the arbitrator's decision came down and simply asked that the award be affirmed." Thus, the court was fully aware of both

Central States' and the arbitrator's failings in the prior proceedings. Nevertheless, the last paragraph of the Seventh Circuit's opinion states as follows:

> Finally, we wish to make absolutely clear that, while Central States cannot recover on this appeal, our decision does not preclude future recovery. In fact, it appears certain that Central States will (and should) receive the full withdrawal fee to which it is entitled. As per arbitrator Jaffe's award, the fund has issued Hunt a renewed demand. Central States appears to be under the impression that either Judge Nordberg's or Judge Shadur's opinions preclude it from collecting on this second demand. This is not the case. Since both judge's rulings focused solely on the fund's prior, premature demand. (Indeed, it should already be complying.) If Hunt fails to pay on this demand, Central States need merely file suit under the MPPAA's enforcement scheme to ensure that it receives interim payments. This leave only one question unsolved: Why didn't Central States save everyone a big headache and pursue this course of action a long, time ago. Both judgments are AFFIRMED.

Central States v. Hunt Truck Lines, 204 F.3d 736, 743 (7th Cir.2000)

On February 29, 2000, Central States filed its third action against Hunt for collection of withdrawal liability for a complete withdrawal by Hunt. Hunt contends that this is the second case against it under the July 1, 1998 revised Demand. Central States claims that this is the first action under the July 1, 1998 revised Demand although in the second case the arbitrator directed Central States to issue the July 1, 1998 revised demand. Hunt moves for summary judgment on Central States third complaint arguing that it involves the precise claims fully litigated before Judge Shadur and it is barred by *res judicata.* In the alternative, Hunt seeks

summary judgment on grounds of laches because Central States has deprived Hunt of its statutory right to arbitrate due to Central States lack of diligence in bringing a revised Demand. Finally, Hunt claims that it has suffered severe prejudice and a denial of due process under the Constitution as a result of such. Central States moves for summary judgment arguing that *res judicata* does not apply because the Seventh Circuit explicitly stated that a subsequent action would not be precluded and because Hunt's failure to make payments under the revised demand constitutes a new wrong for which relief is available. Central States further argues that the basis for the prior decisions was the original demand's prematurity not the merits of Hunt's secondary liability once Wintz defaulted on its payments on July 27, 1999.

Summary judgment is in order "when no genuine issue of material fact exists and when the moving party is entitled to judgment as a matter of law. *Central States v. Bell Transit Co.*, 22 F.3d 706, 710 (7th Cir.1994). On each side's current motion this Court "is not required to draw every conceivable inference from the record-only those inferences that are reasonable"-in the light most favorable to the nonmovant. *Bank Leumi Le-Isreal, B.M. v. Lee*, 928 F.2d 232, 236 (7th Cir.1997) and cases cited there). Because both Hunt and Central States have moved for summary judgment, it is necessary to adopt a dual perspective that sometime involves the denial of both motions. But because the material facts here are not in dispute, no such hazard is posed.

DISCUSSION

Hunt's argument that *res judicata* bars Central States third complaint is insufficient as a matter of law. The *res judicata* questions in this case is controlled by federal law because the prior judgments were rendered in federal court on a federal law claim. *See Hudson v. Hedge*, 27 F.3d 274, 276 (7th Cir.1994); *Conner v. Reinhard*, 847 F.2d 384, 394 (7th

Cir.1988). The three requirements for *res judicata* under federal law are: (1) an identity of the parties or their privies; (2) an identity of the causes of actions; and (3) a final judgment on the merits. *In the Matter of Energy Coop, Inc.*, 814 F.2d 1226, 1230 (7th Cir.1987). There is no dispute that element one—the parties are identical has been met. Rather, the dispute centers around whether the remaining two elements have been satisfied.

As to the identity of the causes of action we find that they are not identical. The record reveals that both the action in front of Judge Nordberg and the action in front of Judge Shadur concerned the propriety of Central States original demand and the effect of premature notice to Hunt together with the Arbitrator's decision to permit Central States to revise the date of the demand notice. It is undisputed that the subject of the arbitration was the May 31, 1996 demand only. (Page 8 of the Arbitration Opinion). It did not concern collection under the revised demand should Hunt choose to disregard payment pursuant to the revised demand. The thrust of the prior decisions in the district court and the Seventh Circuit was that Central States' original demand for withdrawal liability was premature and whether the appropriate method to cure this defect could in fact be a revised demand rather than rescission.

The procedural ramifications of Central States premature notice is separate and distinct from the substantive merits of the final withdrawal liability assessment. To be sure, Central States in its motion to alter or amend judgment attempted to convert the Arbitrator's decision into a final award as to final withdrawal liability assessment but Judge Shadur ruled the attempt too late and prohibited Central States from expanding the breadth of the proceedings in such a manner. Judge Shadur noted that there was no modification sought by either side prior to his judgment which is, of course, what the ERISA statute would have permitted. Hunt's argument that

Judge Shadur's decision confirming the arbitrator's direction to issue a revised demand precludes this action is not supported by a reading of Judge Shadur's decision. Rather, it was implicitly assumed by the arbitrator and Judge Shadur, and explicitly stated by the Seventh Circuit, that Hunt would comply with the revised demand. Indeed the arbitrator "directed the Parties to begin anew the demand, request for review, and arbitration processes. If Hunt wanted to challenge the arbitrator's decision directing the parties to begin the process anew, Hunt could have challenged that decision on appeal. Hunt did not do so. In light of the above it also cannot be concluded that there is a final judgment (element three of the res judicata test) on the merits of the withdrawal liability assessment issue. Moreover, numerous Seventh Circuit cases have held that *res judicata* does not bar a claim based upon a new wrong even if the new wrong is related to a prior wrong previously litigated. *See, e.g. Perkins v. Board of Trustees of University of Illinois*, 116 F.3d 235, 236-37 (7th Cir.1997); *Supporters To Oppose Pollution, Inc. v. Heritage Group*, 973 F.2d 1320, 1326 (7th Cir.1992); *Spiegel v. Continental Illinois Nat'l Bank*, 790 F.2d 638, 646 (7th Cir.1986). It can be concluded that Hunt's failure to make payments under the revised demand is a new wrong separate and distinct from the alleged wrong of failure to pay the original demand. This is true notwithstanding the fact that "essentially the same course of wrongful conduct" is involved. While this Court is aware of the *res judicata* rule set forth in *James v. Gerber Products, Co.*, 587 F.2d 324, 327-28 (7th Cir.1998) we believe it is not applicable given the procedural history of this case.

Furthermore, the language of the Seventh Circuit can only be concluded to be part of the holding of the Court in that this language clearly explained the Court's rationale in reaching its decision to affirm Judge Shadur. If the last paragraph of the Seventh Circuit's opinion was deleted it would in fact impair the analytical holding because the third and fourth sentences affirm the fact that both Judges dealt with the

procedural consequence of the premature demand. The Seventh Circuit clearly stated that its decision did not preclude future recovery because it was undisputed that the Fund had issued a renewed demand.

Finally, we find Hunt's procedural due process argument unpersuasive. Hunt has not been precluded from arbitration in this case. The arbitrator explicitly stated that Hunt should request review and initiate arbitration with respect to the revised demand should it wish to challenge the revised demand.

CONCLUSION

For the reasons set forth above Central States motion for summary judgment is granted as to unpaid withdrawal liability in the amount of $303,592.75 with interest at the prime rate per annum and an amount equal to the greater of interest on the unpaid withdrawal liability or liquidated damages of 20% and attorneys fees and costs. (# 8-1) Central States is directed to file a motion for total judgment for a sum certain within ten days of the date of this order. Hunt's motion for summary judgment is denied (# 31-1).

SO ORDERED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 00 C 1204
Judge Ronald A. Guzman

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD MCDOUGALL, trustee,
Plaintiffs,

v.

HUNT TRUCK LINES, INC.,
an Iowa corporation,
Defendant.

JUDGMENT ORDER

This matter coming before the Court on Plaintiffs' Motion for Summary Judgment and the Court having reviewed the Motion along with the supporting materials hereby FINDS, ORDERS, and ADJUDGES as follows:

A. That Plaintiffs, Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee, have and recover judgment from and against the Defendant, Hunt Truck Lines, Inc., in the total amount of $522,610.07. This amount consists of $324,595.29 in delinquent withdrawal liability payments; $90,651.97 in interest; $90,651.97 in doubled interest, as allowed pursuant to 29 U.S.C. §1132(g)(2); $173.84 in costs for prosecuting this suit; and $16,537.00 in attorneys' fees.

B. That Plaintiffs are awarded execution for the collection of the judgment and cost granted.

C. That the Court retain jurisdiction of the cause for the purpose of enforcing this Order.

Enter: /s/ Ronald A. Guzman
RONALD A. GUZMAN
United States District Judge

Dated: 5/24/01

APPENDIX G

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

Nos. 99-1273, 99-2385

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AND HOWARD MCDOUGALL,
Plaintiffs-Appellants,

v.

HUNT TRUCK LINES, INC.,
an Iowa corporation,
Defendant-Appellee.

Argued Oct. 27, 1999
Decided Feb. 28, 2000

Before WOOD, Jr., FLAUM, and EVANS, *Circuit Judges.*

TERENCE T. EVANS, *Circuit Judge.*

This appeal consolidates two cases arising out of Hunt Truck Lines' refusal to make withdrawal liability payments to Central States under ERISA's multiemployer pension plan provisions. In the first case, Judge John Nordberg found that Central States' admittedly premature fee assessment precluded the court from ordering Hunt to make interim payments on its withdrawal liability while the underlying fee assessment went through arbitration. In the second case, Judge Milton Shadur affirmed an arbitration award that assumed Hunt's liability but failed to provide for an

enforceable money judgment. Central States believes these rulings leave it in an odd and unjust position: despite widespread agreement that Hunt owes withdrawal liability, Central States cannot collect. It asks that we right this wrong and force Hunt to finally pay the money it owes.

Since both halves of this appeal concern the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), 29 U.S.C. §§ 1381-1461, it makes sense to begin with a brief overview of the statute to put the facts that follow in context. The MPPAA arose out of Congress' fear that any time an employer withdrew from a multiemployer pension plan (MPP) under ERISA it could set off a domino effect that, "much like a bank run," could leave the MPP unable to pay its vested obligations. *Artistic Carton Co. v. Paper Indus. Union-Management Pension Fund,* 971 F.2d 1346, 1348 (7th Cir.1992); *accord Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.*, 513 U.S. 414, 416-17, 115 S.Ct. 981, 130 L.Ed.2d 932 (1995). To correct this problem the statute provides that whenever a fund trustee determines that an employer has withdrawn, she can assess the employer "withdrawal liability" of an amount that roughly matches the employer's proportionate share of the plan's unfunded vested benefits. *See Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 118 S.Ct. 542, 139 L.Ed.2d 553 (1997). The employer may contest the trustee's assessment but, to ensure that this will not affect the fund's ability to pay off its obligations, only an arbitrator can decide the merits of the challenge, and the employer must pay "interim withdrawal liability payments" until the arbitrator reaches a final decision. *See id.* Under this "pay now, dispute later" scheme, if the employer wins it recovers its interim payments; if not, the fund collects the remainder of the withdrawal liability. *Robbins v. Pepsi-Cola Metro. Bottling Co.*, 800 F.2d 641, 642-43 (7th Cir.1986). With this framework in place, we move on to the facts.

Central States is a multiemployer pension fund subject to ERISA. Hunt Truck Lines is a trucking firm that was obliged to contribute to the fund under a collective bargaining agreement.

In 1994 Hunt sold its assets to Wintz Parcel Drivers, Inc. and stopped making contributions to the fund Ordinarily, this would require Hunt to pay a withdrawal fee. However, since the sale to Wintz satisfied the statutory requirements of 29 U.S.C. § 1384(a)(1)(C), Hunt avoided payment as long as Wintz made the required contributions. In other words, Hunt became secondarily liable—if Wintz withdrew and failed to pay a withdrawal fee, Hunt remained obligated to ante up for its own withdrawal liability.

On June 3, 1996, Hunt received a notice and demand from Central States requesting $303,372.75 in withdrawal liability. The fund claimed that Hunt's liability was triggered because Wintz had "effected a complete withdrawal." Hunt refused to pay and asked Central States to review its withdrawal liability assessment. Instead, the fund filed suit against Hunt demanding interim withdrawal liability payments. In response, Hunt commenced arbitration proceedings to contest the underlying fee assessment.

Cental States then filed a motion for summary judgment on its claim for the interim payments. The fund argued that because any dispute over the merits of a withdrawal assessment must be settled in arbitration, and 29 U.S.C. § 1401(d) mandates that a court order interim payments to an MPP pending the outcome of arbitration, it was entitled to collect. Hunt, in turn, filed a cross-motion for summary judgment. It asserted that since Cental States' "Statement of Material Facts to Which There Is No Material Issue" revealed that it sought withdrawal liability payments from Hunt *before* Wintz withdrew, and Hunt's secondary liability for the

withdrawal payments could only be triggered *after* a Wintz withdrawal, the fund had no right to demand withdrawal liability payments when it did.

Before addressing these arguments, Judge Nordberg laid out the relevant dates. He first noted that both sides conceded that Hunt received Central States' demand on June 3, 1996. Deciding on the timing of Wintz' final withdrawal proved slightly more difficult. In its memo in support of summary judgment, Central States attested to the fact that Wintz withdrew "on or about July 20, 1996." But after Hunt seized upon this date to argue that it had been billed prematurely, the fund claimed that Wintz had actually withdrawn in May. Central States argued that this date was consistent with its prior filing because its "on or about" language was not sufficiently specific to tie the fund to the prior date. Judge Nordberg found this argument "unbelievable" and concluded that, based on their initial filings, both parties agreed to the basic time frame. He then settled on July 27, 1996, as the date for the Wintz withdrawal since the parties stipulated to that date in their arbitration proceedings.

With the dates set, Judge Nordberg turned to the question of whether Hunt was required to make interim withdrawal liability payments. Looking to the text of the MPPAA, the judge determined that the Act implicitly required that a plan sponsor could only issue notice of withdrawal liability after the event triggering liability occurred.[1] He then found that,

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[1] In making this determination Judge Nordberg relied on the following two sections of the MPPAA:

> § 1381(a) *If an employer withdraws* from a multiemployer plan . . . *then* the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.
>
> § 1382 *When* an *employer withdraws* from a multiemployer plan, the plan sponsor, in accordance with this part, shall—
>
> 1) determine the amount of the employer's withdrawal liability,

because this requirement was a statutory prerequisite to bringing a lawsuit to recover withdrawal liability and Cental States billed Hunt before its liability came due, the fund could not collect interim payments. Judge Nordberg underlined that his decision was not based on Hunt's likelihood of success but, rather, on Central State's failure to fulfill the MPPAA's statutory requirements.

Meanwhile, back at the arbitration proceedings, arbitrator Ira Jaffe also concluded that Hunt had been billed prematurely. Nevertheless, he found that this did not require Central States to rescind its withdrawal liability assessment. Instead, he directed the fund to "revise the assessment to comport with Section 4204,[2] *not* to void the assessment and . . . begin anew the demand, request for review, and arbitration process." To this end, he ordered Central States "to issue a revised Demand, including a revised payment schedule, based upon the fact that Wintz did not miss a payment to the Fund until August, 1996."

Central States immediately sued to affirm and enforce this award, and Judge Shadur promptly granted its motion for summary judgment. Yet, despite this victory, at some point during the two weeks following Judge Shadur's decision Central States began to worry that its arbitration award did not specify that it recover any money. Thus, it filed a last-minute Rule 59(e) motion arguing that to truly enforce the arbitrator's award the court needed to modify its ruling and enter a money judgment.

Judge Shadur refused the request. He stated that the only question he was asked to decide was whether the award

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2) notify the employer of the amount of the withdrawal liability, and 3) collect the amount of the withdrawal liability from the employer.

29 U.S.C. §§ 1381(a) & 1382, respectively.

[2] Codified at 29 U.S.C. § 1384.

should be enforced, and that he answered the question affirmatively. To grant the fund's Rule 59(e) motion, according to Shadur, would require him to step beyond a simple endorsement of the award--a question he was not asked to decide and one that he did not think he could appropriately address on a Rule 59(e) motion.

Central States now appeals both Judge Nordberg's and Judge Shadur's summary judgment rulings, as well as Judge Shadur's denial of its Rule 59(e) motion. We will address each in turn.

We begin with the fund's challenge to Judge Nordberg's ruling. As this decision granted Hunt's motion for summary judgment, our review is *de novo*, and we resolve any factual disputes in the light most favorable to Central States, the nonmoving party. *See Russo v. Health, Welfare & Pension Fund,* 984 F.2d 762, 765 (7th Cir.1993).

The fund believes that the MPPAA plainly forbids Judge Nordberg's ruling. Its argument works in three steps. First, it points to a section of the MPPAA stating that any dispute between an employer and a plan sponsor concerning a determination made under §§ 1381 through 1399 must be resolved through arbitration. 29 U.S.C. § 1401(a)(1). Second, it states that the statutory range of arbitrable issues involved in this case includes § 1383(a) (defining a complete withdrawal), § 1383(e) (defining the date of a complete withdrawal), and § 1384(a)(2) (establishing the liability of the seller of assets in an "exempt" asset sale). Finally, it cites a series of cases where we have held that once a plan sponsor has requested withdrawal liability payments, an employer must either pay the whole liability or make interim payments regardless of any pending dispute on the merits of the assessment. *See, e.g., Trustees of Chicago Truck Drivers v. Central Transp.*, 935 F.2d 114, 118 (7th Cir.1991). Adding together these steps, according to Central States, leads to the conclusion that Judge Nordberg blew it by sticking his nose

into an issue that was reserved for arbitration and by failing to order the interim payments plainly called for under the statute.

Hunt does not so much respond to this argument as offer a defense of Judge Nordberg's reading of the MPPAA. Hunt begins by noting that all parties agree that under § 1384 it retained secondary liability to Wintz. It then contends that this section contains two conditions that needed to be fulfilled before it could be assessed a withdrawal fee: (1) Wintz had to withdraw; and (2) Wintz had to ignore Central States' request that it pay a withdrawal fee. 29 U.S.C. § 1384(a)(2). Hunt maintains that since the parties agreed that Wintz withdrew from the plan after Central States billed Hunt, the fund failed to make a statutorily valid assessment of withdrawal liability. Hunt acknowledges that if the dates were in dispute the case should have been decided by an arbitrator. But since all the facts were uncontested, Hunt believes that when Central States asked the court to enforce the statute it was well within the court's authority to determine that the fund had not sufficiently complied with the statute to obtain the interim payments. *See Galgay v. Beaverbrook Coal Co.*, 105 F.3d 137, 140 (3d Cir.1997) (deciding a different issue, but while laying out the mechanics of the MPPAA stating that "[o]ur jurisdiction is limited to ordering the employer to make interim payments *once* the pension fund has demonstrated that it complied with the statutory requirements for calculating liabilty and notifying the employer"); *see also, e.g., Canario v. Lidelco, Inc.*, 782 F.Supp. 749, 753 (E.D.N.Y.1992) (holding that notifying a withdrawing employer of its withdrawal liability is a statutory precondition to collecting interim payments).

As the parties frame the issue, choosing between these two arguments puts us in a lose-lose situation. If we find for Central States we would sanction a scenario whereby an MPP could declare that an employer had withdrawn because the

Cubs lost, and if the employer refused to begin interim payments while it challenged the assessment, a court would be obliged to force it to pay liquidated damages and make interim liability payments that could not be recovered until the arbitration was complete. If we find for Hunt it would mean that every time an employer withdraws from a fund, it could frustrate the purpose of the MPPAA's "pay now, dispute later" system by forcing a court to address the merits of the trustee's assessment of the withdrawal date before interim liability kicks in.

Fortunately, we face no such dilemma. Because Judge Nordberg's opinion hinged on the parties' agreement that Central States jumped the gun, we can endorse i without undercutting the statute's dispute resolution scheme. This becomes apparent when one considers what would happen if a similar case were to arise after we issued an affirmance of Judge Nordberg's decision. In such a case, the fund would merely have to *plead* that it assessed liability after the employer withdrew to ensure that the court would back off the underlying dispute, order interim withdrawal payments, and leave the contested issues to arbitration. However, if the fund could not honestly plead that it assessed the employer's liability after withdrawal, it could not enforce an assessment that was not envisioned by the statute. In sum, any disagreement on the face of the pleadings would cause the MPPAA to kick in in its current form full force.

Thus, since we can avoid reading the MPPAA to allow funds to arbitrarily assess withdrawal liability without undercutting the statute's dispute resolution mechanism, our choice becomes clear: if, as Judge Nordberg concluded, the underlying facts are undisputed, we must affirm; if they are contested, the MPPAA dictates a reversal.

As to this question, we again side with Judge Nordberg. Central States' effort to back away from its statement that "on or about July 20, 1996, Wintz effected a 'complete with-

drawal' "is unpersuasive. Indeed, the fund never actually said that this statement was incorrect. Instead, it attempted to slip around the language by stating that the date of Wintz's withdrawal was the subject of a separate arbitration between Central States and Wintz. This fact is neither here nor there. If Hunt could have honestly pled that Wintz effected a complete withdrawal in May, it would have. Judge Nordberg correctly found that the parties agreed on the underlying dates.

We also note that in making this determination the court did not rely on the arbitrator's factual findings. While Judge Nordberg chose July 27th as the date of Wintz's complete withdrawal because the parties agreed to it in arbitration, he explained that the exact date was irrelevant so long as it occurred after Central States billed Hunt. Since there is no reason to question that he relied solely on the pleadings in determining the overall time frame, his referral to the arbitration proceeding was, at worst, harmless error.

Turning to Judge Shadur's rulings, we again begin by noting the appropriate standards of review. We assess the summary judgment decision *de novo*. Our review of the Rule 59(e) motion, however, looks only for abuse of discretion. *Highlands Ins. Co. v. Lewis Rail Serv. Co.*, 10 F.3d 1247, 1249 (7th Cir.1993).

Cental States asserts that it is heart-wrenchingly unjust that its victories in front of arbitrator Jaffe and Judge Shadur have not enabled it to collect. The fund argues that since Hunt failed to request arbitration as to the *amount* of the assessment, Hunt's withdrawal liability became fixed by the arbitrator's decision. It then contends that the award assumed that Hunt would have to pay this amount. Since Judge Shadur's judgment did not provide the fund with a mechanism to collect, it believes that he failed to give the arbitration proceeding the force of law—a ruling that would violate both the MPPAA and case law holding that once a

court confirms an arbitration award it should have the same effect as judgments rendered by courts. *See, respectively,* 29 U.S.C. § 1401(b)(3), *and Parsons & Whittemore Alabama Mach. and Servs. Corp. v. Yeargin Constr. Co.*, 744 F.2d 1482, 1484 (11th Cir.1984).

While it is true that the arbitrator's opinion assumed that Central States would eventually collect the withdrawal liability it originally assessed Hunt, it is not clear how the arbitrator thought this was going to happen. Arbitrator Jaffe's statements that the fund should not be required to "begin the assessment process anew" and his order that Central States issue a revised demand are at odds. Perhaps Jaffe merely meant that Central States could stick with its underlying liability assessments when it issued its renewed demand; perhaps he thought his order would require Hunt to immediately pay. We can't know. All we do know is that Jaffe's sole affirmative order was that Central States issue the demand.

Happily, that's all we need to know to handle the fund's appeal. Central States could have returned to the arbitrator to ask for a clarification of the demand before it went to court. It also could have raised its contention that the award necessarily included a money judgment in its pleadings. Instead, it went to court the day after the arbitrator's decision came down and simply asked that the award be affirmed. We have held that an arbitrator's findings of law should only be disturbed by a reviewing court if they appear to be arbitrary and capricious or otherwise not in accordance with the law. *Joseph Schlitz Brewing Co. v. Milwaukee Brewery Workers' Pension Plan*, 3 F.3d 994, 999 (7th Cir.1993), *aff'd*, 513 U.S. 414, 115 S.Ct. 981, 130 L.Ed.2d 932 (1995). To suggest that Judge Shadur should have unilaterally changed the order is a lot of baloney. The fund got what it asked for.

Furthermore, Judge Shadur's denial of he fund's Rule 59(e) motion to amend the judgment did not amount to an abuse of discretion. Rule 59(e) allows a court to correct its own error. Since the judge was not wrong on the merits, he had nothing to correct.

Finally, we wish to make absolutely clear that, while Central States cannot recover on this appeal, our decision does not preclude future recovery. In fact, it appears certain that Central States will (and should) receive the full withdrawal fee to which it is entitled. As per arbitrator Jaffe's award, the fund has issued Hunt a renewed demand. Central States appears to be under the impression that either Judge Nordberg's or Judge Shadur's opinions preclude it from collecting on this second demand. This is not the case. Since both judges' rulings focused solely on the fund's prior, premature demand, Hunt should comply with the fund's later demand. (Indeed, it should already be complying.) If Hunt fails to pay on this demand, Central States need merely file suit under the MPPAA's enforcement scheme to ensure that it receives interim payments. This leaves only one question unsolved: Why didn't Central States save everyone a big headache and pursue this course of action a long, long time ago? Both judgments are AFFIRMED.

APPENDIX H

UNITED STATES DISTRICT COURT
N.D. ILLINOIS, EASTERN DIVISION

No. 98-C-6464

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,
Plaintiffs and Counterdefendants,
v.
HUNT TRUCK LINES, INC.,
Defendant and Counterplaintiff.

April 8, 1999

MEMORANDUM OPINION AND ORDER

SHADUR, *Senior District Judge.*

Central States, Southeast and Southwest Areas Pension Fund and its Trustee (collectively "Fund," treated as a singular noun [1]) seeks enforcement of an arbitration award (the "Award") against Hunt Truck Lines, Inc. ("Hunt") regarding Fund's claim against Hunt for secondary withdrawal liability under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1371, as amended by the Multiemployer Pension Plan Amendments

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[1] Because Fund is a frequent litigant in the federal courts, and to avoid cumbersome repetition, citations to others of its cases in this opinion will refer to it simply as "Central States Fund" rather than spelling out its full name.

Act ("MPPAA"), 29 U.S.C. §§ 1381-1461.[2] For its part, Hunt seeks to vacate or modify the Award. Each party also asks this Court, should it prevail, to grant it the recovery of attorneys' fees and expenses related to this action.

Each of Fund and Hunt now moves for summary judgment under Fed.R.Civ.P. ("Rule") 56. For the reasons stated in this memorandum opinion and order, Fund's summary judgment motion is granted and Hunt's motion is denied. This Court orders enforcement of the Award, leaving the attorneys' fees and expenses issue for resolution in accordance with this District Court's General Rules ("GR") 46 and 47.

Legal Standards

This Court's authority "to enforce, vacate, or modify the arbitrator's award" under MPPAA derives from Section 1401(b)(2). Findings of fact made by the arbitrator are presumed correct, rebuttable only by a clear preponderance of the evidence (Section 1401(c)), and mixed questions of law and fact are reviewed for clear error (*Chicago Truck Drivers, Helpers & Warehouse Workers Union (Independent) Pension Fund v. Louis Zahn Drug Co.,* 890 F.2d 1405, 1411 (7th Cir.1989)). Although an arbitrator's conclusions of law are subject to de novo review (*Central States Fund v. Bell Transit Co.,* 22 F.3d 706, 710 (7th Cir.1994)), "every time a court substitutes its judgment for that of the arbitrator, the benefit of proficiency is lost and disposition becomes more sluggish" (*Jos. Schlitz Brewing Co. v. Milwaukee Brewery Workers' Pension Plan,* 3 F.3d 994, 1000 (7th Cir.1993), *aff'd on other grounds,* 513 U.S. 414, 115 S.Ct. 981, 130 L.Ed.2d 932 (1995)).[3]

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[2] All ERISA and MPPAA provisions will be cited simply "Section—," referring to their Title 29 numbering rather than to ERISA's or MPPAA's internal numbering.

[3] Thus *Jos. Schlitz Brewing,* 3 F.3d at 1000 held that when a court is reviewing an arbitrator's document construction (which is not the

Summary judgment is in order "when no genuine issues of material fact exist and when the moving party is entitled to judgment as a matter of law" (*Bell Transit*, 22 F.3d at 710). On each side's current motion this Court is "not required to draw every conceivable inference from the record—only those inferences that are reasonable"—in the light most favorable to the nonmovant (*Bank Leumi Le-Israel, B.M. v. Lee*, 928 F.2d 232, 236 (7th Cir.1991) and cases cited there). Because both Hunt and Fund have moved for summary judgment, it is necessary to adopt a dual perspective that sometimes involves the denial of both motions. But because the material facts here are not in dispute, no such hazard is posed.

Statutory Background

As first enacted in 1974, ERISA created the Pension Benefit Guaranty Corporation ("PBGC") to administer and enforce a pension plan termination insurance program under which employers were required to pay insurance premiums (*Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 607, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993)). Under those original terms, the guaranty of basic benefits by multiemployer plans in the event of termination was not mandated to take effect until 1978 (*id.* at 607-08, 113 S.Ct. 2264). As the date for mandatory coverage approached, Congress recognized that employers might withdraw from weak plans to escape liability(*id.* at 608, 113 S.Ct. 2264). Fearing that the insurance system as originally conceived might be jeopardized by such an exodus, Congress postponed the mandatory guaranty date and requested that PBGC analyze the potential threat to multiemployer plans and suggest solutions (*id.*).

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situation here) it should ask only "whether the arbitrator adopted a reasoned interpretation of the documents."

In 1980 Congress enacted MPPAA in response to the advice it received from the PBGC (*id.* at 609, 113 S.Ct. 2264). MPPAA's purpose was to hold employers accountable for their vested pension fund liabilities upon their withdrawal from multiemployer plans to avoid shifting the burden to other employers (which might perhaps lead to the domino effect of other employers following suit) (*Bell Transit,* 22 F.3d at 707). Hence an employer that withdraws from a multiemployer pension plan is now held responsible for "a sum approximating the vested but unfunded benefits of the employer's employees" (*Santa Fe Pac. Corp. v. Central States Fund,* 22 F.3d 725, 726 (7th Cir.1994)). Technically MPPAA charges the employer with the difference between the present value of vested benefits and the current value of the plan's assets (*Concrete Pipe,* 508 U.S. at 609, 113 S.Ct. 2264). That "withdrawal liability" not only protects other employers in the plan from having to pay for those benefits (*Santa Fe,* 22 F.3d at 727) but also operates to avoid the ultimate shifting of such costs to PBGC as the insurer under the plan (*Bell Transit,* 22 F.3d at 707).

To collect withdrawal liability, a plan first calculates the amount owed by a withdrawing employer (Sections 1382 and 1391) then notifies the employer of the amount due (Section 1399(b)(1)). Any employer that wishes to challenge the assessment of liability may submit a request to the plan for review (Section 1399(b)(2)) and may initiate arbitration if dissatisfied with the results (Section 1401(a)(1)). Throughout the proceedings, however, the plan's determination of liability "is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous" (Section 1401(a)(3)(A)). After arbitration a party may bring an action to enforce, vacate or modify the award (Section 1401(b)(2)). Generally ERISA and MPPAA establish a "pay first, arbitrate after" system: While proceedings are pending, Sections 1399(c)(2) and 1401(a) require the employer to

make interim withdrawal liability payments until a final determination is made, at which point any payment is recouped if the employer has won (*Central States Fund v. Lady Baltimore Foods, Inc.*, 960 F.2d 1339, 1341 (7th Cir.1992)).

Facts

Fund is an ERISA multiemployer pension plan to which Hunt had a contribution obligation on behalf of some of its employees, as provided in various collective bargaining and participation agreements (Jt.Stmt.¶¶ 1-2). That obligation ended on May 28, 1994, when Hunt sold its assets to Wintz Parcel Drivers, Inc. ("Wintz") (*id.* ¶ 3). In late June 1995 Fund determined that the sale of Hunt's assets to Wintz triggered the requirements of Section 1384 (*id.* ¶ 4). Under that provision Hunt faced the earlier-described withdrawal liability only if certain conditions were not met, such as Wintz' non-withdrawal from Fund's plan during the next five plan years (*id.*).

Fund later determined that Wintz withdrew completely in early May 1996. Accordingly it sent Hunt a May 31, 1996 notice and demand for payment of secondary withdrawal liability because Wintz had not stayed with Fund for the statutorily required five years (*id.* ¶ 8). Fund also notified Wintz (1) of its obligation to make withdrawal payments in a June 14, 1996 letter and (2) of its past-due liability in a letter received by Wintz on August 26, 1996 (*id.* ¶¶ 7, 11). Wintz is currently contesting that assessment in both arbitral and judicial proceedings.

In the meantime Hunt refused to pay the withdrawal liability assessed against it, and in December 1996 Hunt requested arbitration in accordance with Section 1401 (*id.* ¶ 18). Arbitrator Ira Jaffe (sometimes referred to here simply

as "the Arbitrator") presided over the arbitration proceedings, which Hunt described as posing these issues (see its GR 12(M) Statement Ex.3):

> 1) Can a plan issue a notice and demand for withdrawal liability before there is a withdrawal?
>
> 2) Can a plan first demand withdrawal liability against a secondarily-liable employer under ERISA Section 4204 before the liability of the primarily-liable purchaser is paid?

It is apparent from a mere reading of that second issue that it needs recasting, and the Award did indeed reframe it as inquiring whether a plan can first demand withdrawal liability against the secondarily liable seller under Section 1384 before the liability of the primarily liable purchaser is *definitively established.* This opinion will follow that more accurate characterization.

In June 1998 Arbitrator Jaffe issued his Award, in which he found that Fund had issued its notice and demand against Hunt prematurely (*id.* ¶ 26). That was based on his determination that while Fund did not have to wait to assess secondary liability against Hunt until after the Wintz proceedings were fully completed, it did have to wait until Wintz had failed to make at least one payment when due. To conform to that determination, Arbitrator Jaffe directed Fund to issue a revised demand for withdrawal liability and a revised payment schedule with a first payment date of November 1, 1996—four months later than the first payment date in Fund's initial demand (*id.*).

Later the parties stipulated that Wintz had completely withdrawn from Fund on July 27, 1996 (*id.* ¶ 25). Arbitrator Jaffe approved that stipulation and the Award became final (*id.* ¶ 28). Fund issued the revised demand and payment schedule as the Arbitrator had required (*id.* ¶ 27).

At this point Hunt has made no interim payments to Fund. In September 1996 Fund had filed a separate suit seeking interim withdrawal liability payments (*id.* ¶ 14), as typically required in ERISA's "pay now, dispute later" system. This Court's colleague Honorable John Nordberg, to whom that case was assigned, held that Hunt did not have to make interim payments because Fund's premature notice had not technically complied with ERISA's procedural requirements (see *Central States Fund v. Hunt Truck Lines, Inc.*, No. 96 C 5634 (N.D.Ill. Jan. 12, 1999), attached in full to P. Mem.).

Review of the Award

This opinion begins its review of the Award by examining the Arbitrator's resolution of the two questions identified in the preceding section. It then proceeds to determine the Award's enforceability in those terms.

Arbitrator Jaffe answered the first question (whether a pension plan can issue a notice and demand for withdrawal liability before there is a withdrawal) in the negative. Indeed, both parties now agree that Fund issued its initial notice and demand to Hunt prematurely.

As to the second question in its recast form (whether Plan can first demand withdrawal liability against secondarily liable seller Hunt under Section 1384 before the liability of primarily liable purchaser Wintz is definitively established), Arbitrator Jaffe determined that while a plan must wait to assess secondary liability until the primarily liable employer fails to make at least one payment, under Section 1384 it does *not* have to wait until after the issue of the primarily liable employer's withdrawal has been resolved with finality through arbitral and judicial proceedings.[4]

[4] Hunt's repeated insistence that Arbitrator Jaffe answered the second question in the negative is simply incorrect. His answer did not involve a simple "yes" or "no," but rather engaged in the more complex analysis just described.

That reading of the statute comports both with its language and with common sense.

Section 1384(a)(2) reads:

> If the purchaser—
>
> (A) withdraws before the last day of the fifth plan year beginning after the sale, and
>
> (B) fails to make any withdrawal liability payment when due,
>
> then the seller shall pay to the plan an amount equal to the payment that would have been due from the seller but for this section.

That language includes no exhaustion-like requirement directing a plan to attempt to recover the missed withdrawal liability from the purchaser before assessing such liability against the seller. To the contrary, the statute describes exactly what happened here: Purchaser Wintz withdrew before five plan years were over and then failed to make a withdrawal liability payment when due, and Fund assessed the secondary liability against seller Hunt that Hunt would have had to pay had it not come within Section 1384's safe harbor in the first place.[5]

This Court therefore finds that Arbitrator Jaffe correctly answered both questions submitted to him by the parties. But Hunt's central challenge is to the relief provided by the Arbitrator. Hunt argues that Arbitrator Jaffe's remedy not only exceeded the scope of his authority but also violated ERISA's withdrawal liability provisions. This Court disagrees and orders enforcement of the Award.

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[5] Admittedly Fund pulled the trigger too early, but that is not relevant to whether Fund must exhaust its efforts against Wintz before assessing liability against Hunt.

Arbitrator Jaffe acted fully within his arbitral authority when, instead of voiding the assessment completely, he directed Fund to issue a revised demand and payment schedule to Hunt. Hunt contends that fashioning such a remedy was not within the Arbitrator's power because the parties had submitted only two questions to Arbitrator Jaffe and neither question addressed a remedy. That contention glosses over (or ignores entirely) the fact that both parties' briefs before the Arbitrator expressly urged appropriate *relief,* depending on the Arbitrator's answers to the two submitted questions. Hunt cannot now argue that just because Arbitrator Jaffe did not provide the relief Hunt sought, he did not have the authority to fashion any remedy at all.

Hunt further urges that the Award did not comport with ERISA itself—specifically, Sections 1382 and 1399(c)(2) and (5). Hunt reads those provisions hypertechnically, claiming that because Fund issued its initial notice and demand too early—before Wintz failed to make a payment when due—it violated ERISA's timing provisions, so that Fund cannot now recover the secondary liability that everyone acknowledges Hunt would have owed had the notice and demand not been issued prematurely. That argument fails for two reasons.

First, Arbitrator Jaffe had the statutory authority to make adjustments to the demand and payment schedule. Section 1401(d) states in relevant part:

> Payments shall be made by an employer in accordance with the determinations made under this part until the arbitrator issues a final decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination.

Here Hunt has made no interim withdrawal liability payments at all, so that Arbitrator Jaffe appropriately made the subsequent "necessary adjustment[ ]" by ordering Fund to revise the payment schedule according to what Hunt would have owed had the notice and demand been issued at the right time. Nothing within ERISA or MPPAA requires the complete voiding of Fund's assessment against Hunt because of a timing mistake (see *Marvin Hayes Lines, Inc. v. Central States Fund,* 814 F.2d 297, 300 (6th Cir.1987)).

Arbitrator Jaffe sensibly did not nullify the entire notice and demand process, instead simply ordering a revision to reflect the correct dates of Wintz' withdrawal and default and Hunt's subsequent liability. That revision will result in the accurate collection of withdrawal liability, which is MPPAA's ultimate policy goal (*Masters, Mates & Pilots Pension Plan v. USX Corp.,* 900 F.2d 727, 735-36 (4th Cir.1990)). So long as there is no prejudice to the employer and no bad faith on the part of the Fund (*id.* at 736), this Court sees no reason to vacate Arbitrator Jaffe's relief determination.

Hunt argues that it has somehow been prejudiced by Fund's error because it now must pay the interest that has accrued on its withdrawal liability. Quite apart from the fact that Hunt will pay four months' less interest with the revised payment schedule, it had to know when it declined to make interim payments that it might ultimately lose on the merits and be required to pay its liability with interest.[6]

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[6] Judge Nordberg's January 1999 opinion held that Hunt was not required to pay interim withdrawal liability payments while the arbitration was pending because Fund had issued its notice and demand too soon. That somewhat novel decision not to hold Hunt to ERISA's statutorily prescribed "pay now, dispute later" procedure need not impact this review of the Award. That opinion addressed only interim withdrawal liability and did not review Arbitrator Jaffe's decision dealing with Hunt's ultimate withdrawal liability. In any event this Court need not adhere to

Its contention is really bizarre, coming as it does from a business that must understand the nature of interest as the price paid for the use of money—in this instance Hunt has had the use of the money during the period for which it now must pay interest, so that excusing it from such interest payments would confer an undeserved windfall.

Second, the Award does not violate ERISA's provisions governing the assessment and collection of withdrawal liability. Hunt attempts to rely—in an overly formalistic argument—on the sequence of events prescribed by Sections 1382 and 1399(c). Section 1382 sets out the steps a multiemployer plan should take when an employer withdraws from the plan,[7] and Section 1399(c)(2) establishes the number of days the employer has to make its first withdrawal liability payment after receiving the plan's demand. Hunt says that Fund violated those sections because it issued the initial notice and demand before any withdrawal occurred. But that error is precisely what the Arbitrator addressed in the Award. Arbitrator Jaffe ordered that the notice be revised to demand payment for only the time period following Wintz' withdrawal and its subsequent default on its withdrawal liability.

Nothing about the Award in those terms violates Sections 1382 or 1399(c)(2). Nor, for that matter, does it violate Section 1399(c)(5). That provision allows a plan to accelerate withdrawal liability payments, requiring the employer to pay the full outstanding amount with interest if an employer does not make one of its payments on time. It also provides the

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that earlier decision: In addressing the law of the case doctrine, our Court of Appeals teaches that one district court judge is not necessarily held to the decision of another (*Avitia v. Metropolitan Club of Chicago, Inc.*, 49 F.3d 1219, 1227 (7th Cir.1995)).

[7] Those steps comprise (1) the employer's withdrawal, (2) the plan's determination of the amount of withdrawal liability, (3) the notification to the employer of that amount and (4) collection from the employer.

employer with 60 days to cure that untimeliness before such acceleration occurs. Here Fund did not argue that Hunt should be immediately liable for the entire withdrawal amount.[8] Furthermore, because the revised payment schedule ends in May 1999 in all events (H.Ex.5), as a practical matter Hunt will have to pay the entire withdrawal liability at once. Hence the right to cure that Hunt claims it is losing is simply not an issue.

This Court is not going to invoke a "punishment theory" for a plan's simple timing error (*Marvin Hayes Lines,* 814 F.2d at 300-01). Arbitrator Jaffe, "who understands the problems and solutions of the trade" (*Jos. Schlitz Brewing,* 3 F.3d at 1000), fashioned a sensible remedy to cure the timing problem that occurred in this case—a remedy that violates neither ERISA nor MPPAA.

Conclusion

There is of course no genuine issue of material fact, for the cross-motions under Rule 56 present only questions of law. Fund is entitled to a judgment as a matter of law, so that its motion for summary judgment is granted, while Hunt's summary judgment motion is of course denied. This Court orders Hunt to comply with the Award. As for the subject of attorneys' fees and expenses, which the litigants sought in their pleadings but did not address in their Rule 56 motions, GR 46 and 47 establish the timetable and procedures for addressing that subject (without affecting the finality of this ruling—*see Budinich v. Becton Dickinson & Co.,* 486 U.S. 196, 108 S.Ct. 1717, 100 L.Ed.2d 178 (1988)).

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[8] When Fund sent Hunt the revised payment schedule in July 1998, it requested immediate payment only of the payments due at that point (H.Ex.5).

APPENDIX I

UNITED STATES DISTRICT COURT
N.D. ILLINOIS
EASTERN DIVISION

[Filed Jan. 12, 1999]

No. 96 C 5634

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,

Plaintiffs,

v.

HUNT TRUCK LINES, INC.,

Defendant.

ORDER

NORDBERG, *District Judge.*

Plaintiffs have filed this action seeking to collect interim withdrawal liability payments under the Employee Retirement Income Security Act of 1974, as amended by the Multiemployer Pension Plan Amendments Act of 1980.[1] Before the court are the parties' cross-motions for summary judgment. For the reasons set forth below, this court grants summary judgment in favor of the defendant.

BACKGROUND

The following facts are undisputed unless otherwise noted. Defendant Hunt Truck Lines, Inc. ("Hunt") is an Iowa corporation with its principal place of business in Minnesota.

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[1] This case concerns only the issue of interim withdrawal liability payments. A separate action has been filed by Hunt, which deals with the question of final withdrawal liability payments and the arbitrator's award. That case is pending in the Northern District of Illinois (98 C 4466).

Plaintiff Central States, Southeast and Southwest Areas Pension Fund ("Central States") is a multiemployer pension plan, and plaintiff Howard McDougall is the trustee of the plan.

Until approximately May 28, 1994, Hunt contributed to Central States on behalf of Hunt's employees covered by various collective bargaining agreements. On or about May 25, 1994, Hunt sold its assets to Wintz Parcel Drivers, Inc. ("Wintz"). However, the sale of assets did not constitute a "withdrawal" from Central States because the transaction satisfied the criteria for such sales under 29 U.S.C. § 1384. Central States approved of the sale of assets, concluding that it met the requirements of § 1384. Under § 1384, Hunt only would be liable to Central States if Wintz made a with drawal and then failed to make withdrawal liability pay ments. In other words, Hunt would be secondarily liable to Central States.

Several years later, on May 31, 1996, Central States sent Hunt a Notice and Demand for Payment of Withdrawal Liability. Central States assessed Hunt for $303,372.75 in withdrawal liability. Hunt received the Notice and Demand on June 3, 1996. However, it was not until well over a month later—on or about July 27, 1996—that Wintz made a complete withdrawal from Central States within the meaning of 29 U.S.C. § 1383. Thus, at the time Central States sent the May 31, 1996 Notice and Demand to Hunt, Wintz had not completely withdrawn from the plan.

As will be discussed below, the timing of the Wintz withdrawal is important for purposes of this ruling, and Central States has raised only a minor challenge to the July 27, 1996 date that will be used by this court. Initially, in its opening memorandum of law to this court, Central States seemed to agree with this basic time frame, stating that Wintz made a complete withdrawal "on or about July 20, 1996." (Opening Mem. at 2; 2/13/97 Keil Affidavit.) Whether the

date is July 27th or July 20th is unimportant for this ruling because both dates are after the May 31, 1996 Notice and Demand. However, after Hunt argued in its response brief that the May 31, 1996 Notice and Demand was issued prematurely before Wintz had made a complete withdrawal, Central States then appeared to revise its position as to when the Wintz withdrawal actually occurred. In its reply brief, Central States argued that it occurred on or about May of 1996 when Central States Xpress, into which Wintz was merged, was forced into involuntary bankruptcy and ceased covered operations. (Reply at 3-4; 3/25/97 Kiel Aff.) Central States then explained that its original statement—that the Wintz withdrawal occurred "on or about July 20, 1996"—in fact was consistent with its revised position that the Wintz withdrawal occurred in May of 1996 because the original statement supposedly was not "specific" given that it included "on or about" language. This court simply finds this argument unbelievable. In any event, the parties have now stipulated in the arbitration proceedings that July 27th is the relevant date for the Wintz withdrawal, and thus that is the date this court will use.

On September 5, 1996, Central States filed this lawsuit, seeking a judgment for past due interim withdrawal liability payments, interest, liquidated damages, attorneys' fees, and costs pursuant to 29 U.S.C. § 1132(g)(2). It is undisputed that Hunt has not made any interim withdrawal liability payments.

On December 20, 1996, Hunt filed a demand for arbitration under 29 U.S.C. § 1401. On June 23, 1998, the arbitrator issued an Interim Award and held, among other things, that the May 31, 1996 Notice and Demand was issued prematurely. The arbitrator ordered Central States to reissue a new Notice and Demand and stated that the earliest date that a demand to Hunt could have been issued seeking secondary withdrawal liability pursuant to § 1384 would have been in

mid-August 1996 and that the earliest the first payment by Hunt would have been due on November 1, 1996. On July 1, 1998, Central States issued a revised Notice and Demand containing a schedule of payments revised to reflect an initial payment date of November 1, 1996.[2]

ANALYSIS

Both parties have moved for summary judgement on the same basic issue; namely, whether Hunt was required to make interim withdrawal liability payments under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1381-1461. Summary judgment may be granted when the record contains no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A genuine issue for trial will be found only when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). As will be explained below, this court finds that Central States cannot recover interim withdrawal liability payments from Hunt because Central States failed to comply with the statutory prerequisites under the MPPAA.

Before turning to the parties' specific arguments, it is helpful to briefly review the purpose and general structure of the MPPAA. "Congress enacted the MPPAA to protect the financial solvency of multiemployer pension plans." *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., Inc.*, 522 U.S. 192, 118 S.Ct. 542, 546, 139 L.Ed.2d 553 (1997). When an employer withdraws from a multiemployer plan, the withdrawal can have a domino effect because it increases the burden on the other employers

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[2] On October 14, 1998, the arbitrator converted his Interim Award and Opinion of June 23, 1998 to a Final Award and Opinion.

in the plan in turn increasing the chance that those employers will fail. *See Artistic Carton Co. v. Paper Industry Union-Management Pension Fund*, 971 F.2d 1346, 1348 (7th Cir. 1992) ("a series of withdrawals, much like a bank run, can leave the fund unable to pay off vested obligations"). Therefore, under the MPPAA, if an employer makes a "complete withdrawal," the employer must pay a penalt—called "withdrawal liability"—in the amount of the unfunded, vested pension benefits. *Central States, Southeast and Southwest Areas Pension Fund v. Wintz Properties, Inc.*, 155 F.3d 868, 871 (7th Cir.1998).

The MPPAA provides that the trustees of the plan initiate the process of imposing withdrawal liability. *Id.* Under § 1382, when an employer withdraws from a plan, the trustees determine the amount of withdrawal liability and then notify the employer. Although the trustees of the plan make the initial assessment of how much the employer must pay in withdrawal liability, the employer may contest liability by initiating arbitration. 29 U.S.C. § 1401. However, the MPPAA provides that while the arbitration is pending, the employer must make what are known as "interim" withdrawal liability payments until a final determination of liability is made. *Central States, Southeast and Southwest Areas Pension Fund v. Lady Baltimore Foods, Inc.*, 960 F.2d 1339, 1341 (7th Cir.1992). "If he wins the arbitration he will get back whatever he has paid but the rule is pay first, arbitrate after." *Id.* The MPPAA thus sets up what has sometimes been described as a "pay now, dispute later" scheme. *See Galgay v. Beaverbrook Coal Co.*, 105 F.3d 137, 139 (3d Cir.1997) ("Congress foresaw that the purpose of MPPAA would be undermined if employers could postpone paying their debts to pension funds by engaging in protracted litigation over withdrawal liability").

The Seventh Circuit has explained one rationale underlying the MPPAA's "pay now, dispute later" scheme as follows:

> Arbitration is supposed to speed final decision and reduce the costs of getting there. Efforts to alleviate the "harshness" of the MPPAA by examining the employer's probability of success before the arbitrator frustrate achievement of that objective. Instead of one speedy decision, there will be three slow ones. First the employer will resist making interim payments; the district judge will have to examine the merits of the plan's claim to determine the employer's probability of success before the arbitrator. Next the arbitrator will take evidence and decide. Finally the loser will return to court and ask the judge to set aside the arbitrator's decision.

Trustees of the Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. Central Transport, Inc., 935 F.2d 114, 119 (7th Cir.1991).

This court now turns to the parties' specific arguments. Hunt asserts that Central States cannot recover interim withdrawal liability payments in this case because Central States prematurely issued the Notice and Demand before any withdrawal liability occurred. Specifically, Hunt notes that it is undisputed here that Hunt could not be liable for withdrawal liability under § 1384 until—at a minimum—Wintz had made a complete withdrawal from the plan.[3] Given that Wintz did not make a complete withdrawal until July 27, 1996 and that Central States issued the May 31, 1996 Notice and Demand well before that date, the Notice and

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[3] In addition, Hunt argues that it could not be liable until after Central States had first tried and then failed to collect from Wintz. Because this court rules that Central States prematurely issued its Notice and Demand to Hunt before Wintz made a complete withdrawal, this court will not discuss this additional argument.

Demand was premature. Hunt argues that it is a statutory condition precedent under the MPPAA that the trustees of the plan issue the notice only after withdrawal liability has occurred. According to Hunt, Central States "jumped the gun" and should be precluded from any recovery of interim withdrawal liability payments.

In response, Central States does not really dispute the fact that its notice was premature. In particular, Central States has conceded that Hunt could not be liable until Wintz made a complete withdrawal and that Central States issued the notice to Hunt before Wintz made a complete withdrawal.[4] Instead, Central States falls back on the general "pay now, dispute later" scheme and argues that Hunt must make interim withdrawal liability payments regardless of any dispute concerning whether the notice was proper or premature.

These arguments raise two primary questions. First, under the MPPAA, is there a requirement that notice must be issued only after a complete withdrawal has taken place? Second, if there is such a requirement, is it a statutory condition precedent that can be decided by the court in the first instance and one that will excuse the employer from making interim withdrawal payments or is it a question that—like disputes over the amount of the assessment—should be deferred to the arbitrators under the MPPAA's "pay now, dispute later" scheme and one that will not excuse interim withdrawal payments? This court will address each question in turn.

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[4] As noted above in the factual summary, Central States did argue briefly in its original reply brief that its Notice and Demand in fact was not premature. For the reasons already stated above, this court does not believe that this argument withstands rational scrutiny given Central States' own contradictory positions on this issue and given the parties' subsequent stipulation in their arbitration. Moreover, Central States fails to cite any case law or authority to support its undeveloped argument that Wintz made a withdrawal when it entered into bankruptcy even though it had not missed any payments at that point.

As to the first question, Hunt argues that the language of the MPPAA implicitly imposes a requirement that notice only issue until after withdrawal has occurred.[5] Hunt points to two sections of the MPPAA. Section 1381(a) provides:

> *If an employer withdraws* from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

29 U.S.C. § 1381(a) (emphasis added). Section 1382 provides:

> *When an employer withdraws* from a multiemployer plan, the plan sponsor, in accordance with this part, shall—
>
> (1) determine the amount of the employer's withdrawal liability,
>
> (2) notify the employer of the among of the withdrawal liability, and
>
> (3) collect the amount of the withdrawal liability from the employer.

29 U.S.C. § 1382 (emphasis added).

Although these two sections do not directly state that notice may be issued only after withdrawal liability has occurred, the court agrees with Hunt that they clearly reflect a statutory scheme whereby the trustees of the plan must first wait until a withdrawal has occurred before issuing notice. This sequence is inherent in the statutory scheme, even if it is not specifically spelled out. As Hunt phrases the issue in its brief, in order for there to be "withdrawal liability," it only makes sense to say that there first must be a "withdrawal."

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[5] Hunt admits that this statutory requirement exists only "by implication" and that there is "scant precedent" regarding this "specific issue." Neither party has cited a case directly addressing this specific issue, and this court has found none.

Central States does not really dispute the point that the MPPAA imposes such a statutory sequence (*i.e.* withdrawal first and then notice). In its opening memorandum, Central States clearly stated that, to collect withdrawal liability, the plan must "first" determine the amount of withdrawal liability owed by the withdrawing employer and "then" must send notice. (Opening Mem. at 5.)

As to the second question of whether this requirement can be decided by this court or is one for the arbitrator, Central States relies on the well-established case law underlying the "pay now, dispute later" scheme and argues that any concerns about premature notice should be addressed by the arbitrator and should not excuse interim payments.

In support of its position, Hunt cites to the Seventh Circuit's decision in *Trustees of the Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. Rentar Indus.,Inc.*, 951 F.2d 152 (1991). In *Rentar*, the Seventh Circuit discussed one equitable exception to the general "pay now, dispute later" scheme. The Seventh Circuit held that a court may excuse interim payments only if the employer "makes an affirmative showing that the pension fund lacks a colorable claim" and then demonstrates that it will suffer severe financial hardship due to the interim payments. *Id.* at 155. The Fifth Circuit also has recognized a similar equitable exception. *See Trustees of Plumbers and Pipefitters Nat'l Pension Fund v. Mar-Len, Inc.*, 30 F.3d 621, 626 (5th Cir.1994) ("If the pension fund's claim is frivolous or not colorable, then the district court has a narrow measure of discretion to excuse payments of interim withdrawal liability"). The Third Circuit, however, has refused to recognize such an exception. *See Galgay v. Beaverbrook Coal Co.*, 105 F.3d 137 (3d Cir.1997). This court does not believe that the facts of this case really fit within the equitable exception because Hunt has not argued that the payments will cause financial hardship.

Although this court does not find that this case falls under such an equitable exception, this court does believe that the statutory structure of the MPPAA imposes an initial statutory prerequisite that a fund must issue the notice of liability only after the withdrawal triggering liability has occurred. Although admittedly there is little case law addressing this particular issue, several district courts have commented that the MPPAA notice requirement is a "prerequisite" or "precondition" to bringing a lawsuit to collect withdrawal liability payments. *See Canario v. Lidelco, Inc.*, 782 F.Supp. 749, 753 (E.D.N.Y.1992) ("compliance with the statutory notice requirements is a prerequisite to collection on a suit to recover withdrawal liability"); *Debreceni v. George Lamoureux & Co.*, 629 F.Supp. 598, 601 (D.Mass.1986) ("the notice requirement set forth in 29 U.S.C. § 1399(b)(1) is a precondition to a suit in federal court to collect withdrawal liability").

In addition, this position is implicitly supported by the Third Circuit's recent opinion in*Galgay*. Although the Third Circuit in *Galgay* refused to recognize an equitable exception to the requirement of interim payments, the Third Circuit nonetheless implicitly recognized that a fund must satisfy certain initial statutory prerequisites. After first discussing and emphasizing the importance of the general "pay now, dispute later" scheme, the Third Circuit stated: "Our jurisdiction is limited to ordering the employer to make interim payments *once the pension fund has demonstrated that it complied with the statutory requirements for calculating liability and notifying the employer.*" *Id.* at 140 (emphasis added). To support this statement, the Third Circuit cited to 29 U.S.C. § 1382—the same section relied upon by Hunt in this case. The Third Circuit characterized the issue of whether the fund complied with the statutory notice requirements as a "burden" that the must be "sustained" initially by the fund. *Id.* at 141.

This court recognizes the reasons behind, and the case law supporting, the general "pay now, dispute later" scheme. However, the issue in this case—whether a fund may jump the gun and issue notice before withdrawal liability has occurred—is different in kind and one that is a jurisdictional prerequisite. As such, this court finds that proper and timely notice is a precondition for the triggering of the duty of the employer to make interim withdrawal liability payments. This is not a case where this court is attempting to "examin[e] the employer's probability of success" before the arbitration takes place, *Central Transport*, 935 F.2d at 119, but is instead one where this court is ensuring that the fund has complied with the procedural requirements of the MPPAA. Under the MPPAA, a fund is given the unilateral right to initiate the payment process simply by issuing a notice and demand after a statutorily-defined withdrawal has occurred. This court believes that along with this right the fund should have a responsibility to proceed in the proper statutory manner.

As noted previously, under the facts of this case and the parties' stipulation, Central States issued its notice prematurely before Wintz had made a complete withdrawal. Therefore, at the time Central States filed this lawsuit, it clearly had not complied with the MPPAA's notice requirements.[6] Central States has not argued for any equitable exception to excuse its own failure to observe the statutory prerequisites regarding notice, and this court is not aware of any such exception. As a result, Central States cannot collect interim liability payments.

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[6] Thus, this is not a case where the parties have a good faith dispute over exactly when the withdrawal occurred such that there is doubt as whether the notice was premature.

CONCLUSION

For the reasons set forth above, this court grants defendant Hunt's motion for summary judgment and denies plaintiffs' motion for summary judgment. Defendant's motion for leave to bring in a third-party defendant is stricken as moot. This is a final judgment.

APPENDIX J

AAA Case No. 51 621 00017 97
Withdrawal Liability

In the Matter of Arbitration:

HUNT TRUCK LINES, INC.,

and

CENTRAL STATES, SOUTHEAST and
SOUTHWEST AREAS PENSION FUND.

Before: IRA F. JAFFE, Esq., *Impartial Arbitrator.*

APPEARANCES:-

For the Employer:

HERVEY H. AITKEN, JR., Esq.
ROY A. SHEETZ, Esq.
(TAYLOR, THIEMANN & AITKEN, L.C.)

For the Fund:

JON K. STROMSTA, Esq.
(Counsel)

BACKGROUND

The claim in this matter was submitted on the basis of a stipulated factual record and briefing.

The Employer, Hunt Truck Lines, Inc. ("Hunt"), was contractually obligated for many years pursuant to collective bargaining agreements and participation agreements to contribute to the Central States, Southeast and Southwest Areas Pension Fund ("Fund") on behalf of certain employees.

Hunt continued to make those contributions until May 28, 1994, when it sold its assets to Wintz Parcel Drivers, Inc. ("Wintz").

The transaction by which Wintz purchased Hunt's assets was structured to take advantage of the provisions of Section 4204 of ERISA, 29 U.S.C. § 1384. On June 23, 1995, the Fund wrote to Hunt's former counsel and indicated that the sale of assets from Hunt to Wintz qualified as a Section 4204 transaction and, therefore, Hunt incurred no immediate withdrawal liability as a consequence of Hunt's cessation of contributions to the Fund. The Fund's letter also advised that Wintz was granted a variance from posting a buyer's bond in the amount of $104,022.00, and that Hunt was not obligated to post a bond or other security unless it liquidated or distributed its assets during the 5 plan years following the year of the sale of assets.

Section 4204 of ERISA provides in pertinent part that:

> (a) (1) A complete or partial withdrawal of an employer . . . does not occur solely because, as a result of a bona fide, arm's-length sale of assets to an unrelated party . . ., the seller ceases covered operations or ceases to have an obligation to contribute for such operations, if—
>
> (A) the purchaser has an obligation to contribute to the plan with respect to the operations for substantially the same number of contribution base units for which the seller had an obligation to contribute to the plan;
>
> (B) the purchaser provides to the plan for a period of 5 plan years commencing with the first plan year beginning after the sale of assets, a bond issued by a corporate surety company that is an acceptable surety for purposes of section 412 of this Act; or an amount held in escrow by a bank or similar financial institution, satisfactory to the plan, in an amount equal to the greater of—

(i) the average annual contribution required to be made by the seller with respect to the operations under the plan for the 3 plan years preceding the plan year in which the sale of the employer's assets occurs, or

(ii) the annual contribution that the seller was required to make with respect to the operations under the plan for the last plan year before the plan year in which the sale of the assets occurs,

which bond or escrow shall be paid to the plan if the purchaser withdraws from the plan, or fails to make a contribution to the plan when due, at any time during the first 5 plan years beginning after the sale; and

(C) the contract for sale provides that, if the purchaser withdraws in a complete withdrawal, or a partial withdrawal with respect to operations, during the first 5 plan years, the seller is secondarily liable for any withdrawal liability it would have had to the plan with respect to the operations (but for this section) if the liability of the purchaser with respect to the plan is not paid.

(2) If the purchaser—

(A) withdraws before the last day of the fifth plan year beginning after the sale, and

(B) fails to make any withdrawal liability payment when due, then the seller shall pay to the plan an amount equal to the payment that would have been due from the seller but for this section.

(3) [Provides for bonds or escrow in the event that a seller's assets are distributed or a seller is liquidated within the 5 plan years occurring after the sale of assets]

(4) The liability of the party furnishing a bonding or escrow under this subsection shall be reduced, upon payment of the bond or escrow to the plan, by the amount thereof.

(b) (1) For the purposes of this part, the liability of the purchaser shall be determined as if the purchaser had been required to contribute to the plan in the year of the sale and the 4 plan years preceding the sale the amount the seller was required to contribute for such operations for such 5 plan years.

Wintz is part of a controlled group of trades or businesses under common control which together constitute a single employer within the meaning of Section 4001(b)(1) of ERISA, 29 U.S.C. § 1301(b)(1) and the regulations promulgated thereunder. (For purposes of this arbitration decision, the entire Wintz controlled group will be referenced simply as "Wintz.")

On June 3, 1996, Hunt received the Fund's Notice and Demand for Payment of Withdrawal Liability ("Hunt Assessment"), dated May 31, 1996, which is the subject of this arbitration. The basis for the Hunt Assessment was the Fund's claim that Wintz had completely withdrawn from the Fund. The Fund asserts that Wintz permanently ceased making contributions on or about May 3, 1996.

The Fund issued the Hunt Assessment prior to issuing an assessment to Wintz. The Fund issued a Notice and Demand for Payment of Withdrawal Liability to Wintz, dated June 14, 1996 which was received by Wintz on or about June 17, 1996 ("Wintz Assessment").

The Hunt Assessment demanded payment of $303,372.75 in withdrawal liability from Hunt. The amortization schedule, determined in accordance with Section 4219 of ERISA, provided for monthly payments in the amount of $10,742.75, commencing on July 1, 1996.

The Wintz Assessment demanded payment of $2,958,136.71 in withdrawal liability from Wintz. The amortization schedule, determined in accordance with Section 4219 of ERISA, provided for monthly payments of $202,930.66, commencing on August 1, 1996.

Neither Hunt nor Wintz made any of the required interim payments.

Both Hunt and Wintz filed separate Requests for Review. Both Hunt and Wintz separately initiated arbitration pursuant to Section 4221 of ERISA, 29 U.S.C. § 1401.

The Fund separately sued both Hunt and Wintz for the unpaid interim payments. The Fund's interim payment collection action against Hunt was filed on September 5, 1996. Neither Party has advised the Arbitrator of any ruling by the Court to date in that matter.

The Fund's interim payment collection action against Wintz was filed on February 7, 1997. On June 17, 1997, Judge George W. Lindberg of the United States District Court for the Northern District of Illinois entered an order requiring Wintz to pay all past due interim payments by June 30, 1997 and to make future interim payments when due or to post a bond to guarantee such payments. Wintz failed to comply with that order and was adjudged in contempt of court on December 23, 1997. The Fund moved for summary judgment in the Wintz interim payments collection action on January 9, 1998. As of the date of the filing of the Stipulated Record in this matter, no ruling on that motion had been reported to the Arbitrator.

The Parties disagreed as to when (and whether) Wintz completely withdrew from the Fund.

The Parties declined to stipulate as to the last date on which contributions were made by Wintz to the Fund. The Fund's October 29, 1996 Response to Wintz's Request for Review of the Wintz Assessment stated in pertinent part that:

> On or about May 3, 1996, creditors placed Central States Xpress, Inc. [f/k/a Wintz Freightways, Inc. and Wintz Parcel Drivers, Inc.] into an involuntary Chapter 7 bankruptcy which was converted into a voluntary Chapter 11 bankruptcy on May 17, 1996: On September 6, 1996, the Central States Xpress, Inc. bankruptcy was converted to a voluntary Chapter 7. The employer's contribution base units have declined as follows:

Date	# CBUs	#FTEs
January 1996	1,314	328.50
February 1996	1,259	314.75
March 1996	1,118	223.60
April 1996	618	154.50
May 1996	176	44.00
June 1996	12	3.00
July 1996	3	0.75
August 1996	0	0.00

> The last covered employee retired effective August 31, 1996.

[It should be noted that the Fund's Response (from which the above-information was quoted) did not purport to separate the CBUs made by Wintz which were applicable solely to the former Hunt covered operations from those which were generated by other covered operations of Wintz.]

According to a March 25, 1997 affidavit filed by Harry E. Keil, the Fund's Manager, Delinquent Accounts, in the interim payments collection action against Hunt (Case No. 96 C 5634; N.D. Ill.), the Fund and Wintz dispute Wintz's date of complete withdrawal. According to Mr. Keil's affidavit, the Fund maintained that the withdrawal occurred in May,

1996 when Central States Xpress was forced into involuntary bankruptcy and ceased covered operations, whereas Wintz is asserting that no withdrawal occurred until July or August, 1996. Hunt asserts herein that the last contribution on behalf of an employee of the Wintz controlled group was made on July 20, 1996 and that any withdrawal by Wintz did not occur until after that date. The limited stipulated record did not make clear whether the work which generated the obligation to make the claimed July 20, 1996 contributions was performed in July, 1996 or in a previous month.

According to the Request for Review filed by Wintz's Counsel on September 10, 1996, Wintz was asserting that no complete withdrawal had yet occurred because Wintz "continues to employ a single employee on a bona fide basis under the relevant collective bargaining agreement and to make contributions to the Fund as required by the collective bargaining agreement on behalf of such employee."

On December 20, 1996, Hunt's Counsel wrote to the American Arbitration Association ("AAA") initiating this arbitration. The Claim or Relief Sought was described in the Demand for Arbitration as follows:

> (1) That the fund desist from attempting to collect withdrawal liability from Hunt Truck Lines unless and until it has collected from Wintz Parcel Drivers, to whom Hunt sold its assets pursuant to a transaction under 29 U.S.C. § 1384 approved by Central States and pursuant to a contract between Hunt and Wintz Parcel Drivers.
>
> (2) At least $303,592.75 plus all other relief to which Hunt may be entitled.

During a series of pre-hearing telephone calls, the Employer phrased the issues presented in this arbitration as *follows:*

> 1) Can a plan issue a notice and demand for withdrawal liability before there is a withdrawal?
>
> 2) Can a plan first demand withdrawal liability against a secondarily-liable employer under ERISA Section 4204 before the liability of the primarily-liable purchaser is paid?

The Employer abandoned all of the other issues contained in its Request for Review.

CONTENTIONS OF THE EMPLOYER

Section 4204 makes plain that the liability of Hunt is secondary in nature. The Fund was precluded by virtue of Section 4204(a)(2) from imposing any liability on Hunt unless two conditions were satisfied— 1) Wintz withdrew before the last day of the 5th plan year beginning after May 28, 1994; *and* 2) Wintz failed to make a withdrawal liability payment when due. Then, and only then, could the Fund assert withdrawal liability against Hunt in the amount which would have been due from Hunt if it had a complete withdrawal on May 28, 1994.

The Fund's May 31, 1996 assessment was prematurely issued, is fatally flawed, and must be rescinded. As of May 31, 1996, neither of the two conditions precedent to the imposition of secondary withdrawal liability on Hunt had been met. Wintz had not withdrawn from the Fund. [Hunt recognizes that this question is presently under litigation. Nonetheless, Wintz continued to make contributions after May 31, 1996 and there is no ruling supporting the Fund's theory that Wintz had withdrawn as of May 3, 1996.] Even more significant, however, is the fact that Wintz could not possibly have failed to have made a withdrawal liability

payment as of May 31, 1996 since the first such payment demanded of Wintz by the Fund was not even due until August 1, 1996—approximately two months later!

It is well established that, until the Fund demands payment, a withdrawing employer owes nothing to the Fund under MPPAA. *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corporation of California; Inc.*, 522 U.S. ___, 21 EBC 2153 (1997) [quoting *Milwaukee Brewery Workers Pension Plan v. Jos. Schlitz Brewing Company*, 513 U.S. 414 (1995).]

Stated differently, if Wintz owed no withdrawal liability to the Fund on May 31, 1996, it follows as a matter of law that neither did Hunt.

The Fund has previously attempted to improperly violate the scheme established by Section 4204 with regard to the secondary liability of sellers of assets. In *Central States, Southeast and Southwest Areas Pension Fund v. Bell Transit Company*, 22 F.3d 706, 18 EBC 1355 (7th Cir. 1994), an employer (Bell) sold substantially all of its assets to another employer (Best) in a Section 4204 transaction. After the sale, Bell began winding down its affairs. Rather than post a bond, however, Bell held the proceeds from the sale in cash. The cash was not distributed to shareholders, but instead was maintained in an interest bearing account until the conclusion of the five plan year period in which it could be found to be secondarily liable to the Fund. The Fund, upon learning that of Bell's actions, asserted that the transaction failed to satisfy Section 4204 because of the Fund's claim that Bell had liquidated and not provided the Section 4204(a)(3)(A) bond. Arbitration ensued and the arbitrator held that: 1) Bell had not "liquidated," but rather had "liquefied"; and 2) the statutory bond, which was contained in Section 4204(a)(3)(A) was not an express requirement for the application of Section 4204.

The District Court upheld the arbitrator's finding that Bell was not liable to the Fund, albeit on somewhat different grounds than the arbitrator.

The Court of Appeals for the Seventh Circuit affirmed. The Court held that whatever occurs after the sale is irrelevant with regard to the applicability of Section 4204 as a safe harbor for selling employers unless the stated triggers for secondary liability are satisfied. In the words of the Court of Appeals:

> . . . As a general rule, the time for determining whether the three conditions [contained in Section 4204(a)(1)] are met, and withdrawal liability is avoided, is at the time that the assets are sold, not afterwards. . . . There is nothing in the language of the statute which indicates that anything further—such as the future fulfillment of the obligations agreed to in section (a)(1)—is required. *Cullum*, 973 F.2d at 1338. Therefore, once the seller has complied with the requirements of section (a)(1) at the time of the sale, the seller is within § 1384(a)'s safe harbor and the plan must pursue any subsequent violations using the remedies provided in the statute: first, the assessment of withdrawal liability against the purchaser, and then, if that fails, the plan may collect the purchaser's bond posted in accordance with section a(1)(B) or seek to collect from the seller based on the seller's secondary liability.

(22 F.3d at 711-12, 18 EBC at 1361.)

The Court also noted that, based upon Best's ongoing contributions to the Fund, the interpretation urged by the Fund in *Bell Transit* would have resulted in a double recovery to the Fund.

The Court of Appeals in Bell Transit relied upon a prior sales of assets case involving the Fund—*Central States Southeast and Southwest Areas Health and Welfare Fund v.*

Cullum Companies, 973 F.2d 1333 (7th Cir. 1992). In *Cullum*, a seller (Cullum) sold warehousing operations to a buyer (SuperValu). At the time of the sale, the sale of assets agreement met the three conditions contained in Section 4204(a)(1) of the Act. Approximately 22 months after the sale, SuperValu closed the operations and, pursuant to provisions in the asset sales agreement; returned the warehousing assets to Cullum. The Fund assessed withdrawal liability against Cullum on the basis of its assertion that, once contributions were no longer being made on behalf of substantially the same number of CBUs Cullum was to be treated as if it had withdrawn as of the date of the sale of assets to SuperValu—a date which also marked the permanent cessation by Cullum of contributions to the Fund. No complete withdrawal took place, however, with regard to SuperValu, who had numerous other employees on whose behalf it made contributions to the Fund. (The Fund never issued SuperValu an assessment based upon a partial withdrawal theory and, as a result) the Court did not discuss whether a partial withdrawal had occurred due to the closure of the warehouse operations.) The Court of Appeals reversed the district court and an arbitrator who both had upheld the Fund's assessment against Cullum.

In reversing the lower court, the Court of Appeals interpreted Section 4204 and held that whether a sale of assets agreement qualifies for Section 4204 safe harbor was to be determined as of the date that the agreement was entered into and that Section 4204 carefully delineates the circumstances under which sellers who have Section 4204 agreements may be assessed withdrawal liability. In the words of the *Cullum* Court:

> . . . An asset sale structured to comply with section 1384 does not lead to withdrawal liability on the part of the seller/employer. If the purchaser later withdraws from the pension plan, the plan can assess withdrawal liability

> against the purchaser. If the purchaser fails to pay the withdrawal liability or fails to make a required contribution, the plan can either collect on the bond posted by the purchaser or seek to collect from the seller based on the seller's secondary liability. This statutory framework fully protects the solvency and viability of pension plans with the least practicable intrusion into normal business transactions. Thus, there is no reason for the courts to add further provisions. . . .

(973 F.2d at 1340, 16 EBC at 1278-79).

In a footnote, the *Cullum* Court stated that:

> As required by section 1384(a)(1)(C), Cullum contracted to remain secondarily liable for any withdrawal liability incurred in the first five years after the sale. Pursuant to sections 1384(a)(1)(C) and 1384(a)(2), Central States could have attempted to recover from Cullum on the basis of its secondary liability. Of course, this would require that Central States first try to collect from Super Valu which it did not do.

(973 F.2d at 1340n.3, 16 EBC at 1278n.3).

Neither the law nor the Fund's violation of it have changed since the *Cullum* case was decided. The Fund should not be allowed to flout the requirements of ERISA in this manner. Because the Fund is required to determine the amount of withdrawal liability owed by the purchaser—the primarily responsible employer—prior to imposing withdrawal liability on a seller, such as Hunt, the Fund's improper assessment should be deemed a nullity and rescinded in its entirety.

If the arbitrator in the Wintz case ultimately agrees with Wintz's position and holds that no withdrawal has occurred, then Hunt as a matter of law would owe the Fund no withdrawal liability. In such a scenario, Hunt would be in the same position as Cullum.

Alternatively, to the extent that the Fund recovers some or all of the withdrawal liability it claims that Wintz owes, Hunt must be allowed a pro rata credit for the amounts so collected to prevent the Fund from receiving an improper double recovery. [The "double recovery" cases, however, have all involved situations in which the buyer continues to make contributions on an ongoing basis. None have involved situations, like the instant case, where the sold covered operations have permanently closed prior to the end of the five plan year period provided in Section 4204.]

Hunt asserts that the appropriate "pro-ration" to avert "double recovery" would be to credit Hunt with 11.4% of the payments, if any, made by Wintz. Hunt's argument in this regard, is based upon its calculation that its assessment ($303,372) is 11.4% of Wintz's assessment after "netting out" Hunt's assessment ($2,654,764). This approach implicitly assumes that the withdrawal liability issued to Wintz includes liability based upon the same contribution base units upon which Hunt's own "secondary" liability is based. [This argument, however, ignores the fact that only a portion of the seller's contribution history is transferred to the buyer in Section 4204 qualifying asset sales situations.]

The calculation of Hunt's withdrawal liability even under such an alternative theory cannot proceed until it is clear that Wintz owes withdrawal liability and either pays, or fails to pay, that liability.

The Fund's assessment in this case has resulted in prejudice to Hunt. If Wintz were to pay its entire assessment, then no secondary liability whatsoever attaches to Hunt. *See, e.g, In re Hoffman Management Corporation*, 11 EBC 1489 (Cornelius 1989) and 11 EBC 1505 (Cornelius 1989) (both discussing the calculation of secondary liability for an employer, Hoffman, who entered into a valid Section 4204 sale of assets agreement, and whose buyer, Manley, failed to make withdrawal liability payments).

The Act provides that Hunt is only to be secondarily liable in the event that certain conditions subsequent occur. The Fund is obligated to recover whatever withdrawal liability is due, but only what is due, and that from the primarily liable party first. *Borden v. Bakery and Confectionery Union and Industry International Pension Fund*, 14 EBC 1518 (D. Md. 1991) (holding that the CBUs attributable to operations which were divested pursuant to a properly structured Section 4204 asset sale could not be counted as part of the seller's CBUs in the event of a subsequent partial or complete withdrawal. By the seller; in discussing another arbitration decision with the same fund, *Del Monte Corporation*, 8 EBC 1574 (Nagle 1986), the Court noted that "In order to determine the seller's secondary liability; obviously, it was necessary to determine the buyer's liability as established under the rules of MPPAA § 4204." 14 EBC at 1525.

The Fund's decision to waive the buyer's bond by Wintz also deprived the Fund of monies from Wintz which could have been used to reduce Wintz's unpaid withdrawal liability. To the extent that the Fund "lost" $104,022.00 due to the granting of a variance from the requirement that Wintz post a buyer's bond, the harm should be undertaken by the Fund and not by shifting that risk to Hunt on a secondary liability theory. Hunt should receive a credit in the amount of $104,022.00 from any of its remaining withdrawal liability even if Wintz pays none of its primary withdrawal liability.

Section 4225(b) of ERISA, 29 U.S.C. § 1405(b), imposes a 50% reduction in withdrawal liability for employers like Wintz who are insolvent and undergoing liquidation. Inasmuch as Hunt's liability is secondary to that of Wintz, at such time as the Fund is permitted to pursue a claim for secondary liability against Hunt, Hunt should also enjoy the benefit of that reduction in withdrawal liability (whether or not that issue is raised in Wintz's arbitration).

For all of these reasons, the Arbitrator should conclude that: 1) the Fund's assessment did not comport with Section 4204 of the Act; and 2) the assessment should be voided. If, however, the Arbitrator is not inclined to void the assessment, then the Fund's attempt to collect on the assessment should be held in abeyance until it is determined whether Wintz will pay any withdrawal liability (or whether, in fact, Wintz has even withdrawn). If the Arbitrator permits the Fund to proceed at this date, then the liability of Hunt should be reduced by virtue of the Fund's failure to have collected a buyer's bond from Wintz and by virtue of Section 4225(b) of the Act.

CONTENTIONS OF THE FUND

The approval of the Hunt-blintz sale of assets agreement as conforming to Section 4204(a)(1) and as not immediately triggering any withdrawal liability on the part of Hunt was expressly conditioned upon continued compliance with Section 4204 by Wintz, the purchaser of Hunt's assets. Unfortunately for Hunt, Wintz withdrew from the Fund prior to the end of the fifth plan year following the sale. That conduct by Wintz, over which Hunt admittedly lacked control, triggered Hunt's obligation to make payment to the Fund in "an amount equal to the payment that would have been due from the seller [Hunt] but for this section [4204]." In other words, Hunt became obligated to then pay to the Fund the withdrawal liability that it would have been assessed in 1994 due to the permanent cessation of contributions to the Fund as of that date by Hunt.

The determination by the Fund that Wintz had permanently withdrawn from the Fund cannot be dismissed as incorrect. Wintz permanently ceased all covered operations as of May 3, 1996. The Fund promptly thereafter assessed Wintz withdrawal liability and Wintz did not make the required interim payments.

Hunt has also subverted the "pay now, dispute later" scheme of ERISA by not making interim payments, as required by the Act, and by contesting its clear obligation in that regard in a collection action in the Northern District of Illinois.

Hunt's position that the Fund may not assess and collect Hunt's own withdrawal liability until after the Fund has collected all that it can from Wintz is without merit and without legal support. The withdrawal liability that the Fund seeks to collect from Hunt in this arbitration is Hunt's, not Wintz's. Hunt's liability to the Fund is not derivative of Wintz's liability. Section 4204 of ERISA makes plain that the seller (Hunt) is obligated to pay its own withdrawal liability if Wintz withdrew prior to the end of the fifth plan year following the sale and if Wintz failed to make any withdrawal liability payment when due. There is no question factually that Wintz did, in fact, fail to make its withdrawal liability payments.

The Fund has diligently pursued its claims against Wintz. Those claims, however, are independent of the Fund's rights to collect Hunt's statutory withdrawal liability from Hunt.

The plain language of Section 4204(a)(2) also makes clear that funds are not required to wait to impose withdrawal liability on sellers until after all collection efforts against buyers—including collection suits and arbitration—have been completed. The trigger for Hunt's own withdrawal liability is the failure of Wintz to make a single payment. Hunt's exhaustion argument is at odds with the language of Section 4204 by arguing that the Fund must wait until Wintz's liability has been finally determined and until it is known precisely what proportion of that liability will be ultimately paid, in fact, by Wintz. Should the Arbitrator in this case direct the Fund to wait to seek collection against Hunt until arbitration has been completed or until judgment is entered or until post judgment collection actions and appeals have been

completed or until bankruptcy proceedings have been completed? It is not surprising that neither Hunt nor any of the authorities it cited address these points. The Employer's argument is little more than an attempt to have the Fund's efforts be declared "incomplete" so that Hunt may continue to avoid paying its withdrawal liability.

Hunt's claims that the Fund's transmittal to Hunt of the assessment a few weeks prior to its sending Wintz its notice of assessment somehow should operate to void the assessment issued to Hunt must be rejected. No reason has been shown to require that the existing assessment be rescinded and requiring the Fund to start matters again from the beginning. Rather, if the Arbitrator determines that the notice of Hunt's assessment was issued prematurely, the Arbitrator has authority to make "any necessary adjustments" in the payments owed to the Fund by Hunt. In this case, such an adjustment, if deemed necessary at all, would address the date on which the missed payments by Hunt should have been made.

The alternative would be to encourage the Fund to issue a series of "alternative assessments" in situations such as the instant case where a dispute arises regarding actual withdrawal dates and/or the timing of the issuance of assessment notices. It should not be lightly inferred that Congress intended use of such a cumbersome and unworkable alternative process.

Hunt's contentions that the imposition of withdrawal liability would result in "double recovery" by the Fund and that Hunt's liability cannot be determined with certainty until after the arbitration/litigation over Wintz's withdrawal liability obligations must be rejected. The formula for calculating Hunt's withdrawal liability obligation is clearly set forth in Section 4204(a)(2) of the Act. It is equal to the amount that Hunt would have paid due to its May 28, 1994 complete withdrawal from the Fund but for the application of

Section 4204 of the Act. Moreover, neither of the issues raised by Hunt in the arbitration address the calculation/ amount of Hunt's withdrawal liability. Any attempt to raise such issues at this late date must be found procedurally improper and dismissed on that basis.

Even if considered on the merits, however, the contentions of Hunt are simply incorrect as a matter of law. Once Wintz failed to make required payments, the provisions for Hunt's "secondary" liability under Section 4204(a)(2) were triggered.

The case law cited by Hunt regarding potential double recovery by the Fund is also misplaced. First, the bulk of Hunt's contribution history was never transferred to Wintz in this case. Pursuant to Section 4204(b)(1) of the Act, only the last 5 plan years of contribution history of Hunt is attributed to Wintz when calculating and assessing Wintz withdrawal liability. Second, unlike *Borden* and *Bell Transit*, Wintz is not continuing to make contributions to the Fund on behalf of the covered operations which were transferred by Hunt. Third, the assertion that Hunt is entitled to some sort of credit based on the amount owed and paid by Wintz to the Fund is groundless. No support for such a credit exists in the carefully crafted language of Section 4204 of the Act (or any other applicable provision of the MPPAA).

The Section 4225(b) and buyer's bond based credit claims of the Employer should be stricken. They were not raised until Hunt's response brief and were not raised as issues in this arbitration. They are procedurally and substantively lacking in merit and should be dismissed in their entirety by the Arbitrator.

For all these reasons, summary judgment should be entered in favor of the Fund on its claim for withdrawal liability against Hunt.

DISCUSSION AND OPINION

The principal legal contention of Hunt—that the Fund improperly issued the assessment prior to the point in time when the statutory triggers for the imposition of secondary liability had been met—is clearly correct. As of the date on which the assessment was issued, neither of the Section 4204(a)(2)(A) and (B) triggers appears to have been met. The Fund's response to Wintz's Request for Review reflects that as of May 31, 1996, Wintz still was making contributions to the Fund on behalf of covered employees. More significantly, regardless of the precise date of Wintz's withdrawal (assuming *aruendo* that Wintz, in fact, withdrew from the Fund), Wintz had not been assessed withdrawal liability by the Fund as of May 31, 1996 and had not failed to make a withdrawal liability payment when due. Pursuant to the stipulated facts, no demand had been made of Wintz prior to mid-June, 1996 and no withdrawal liability payment was due from Wintz until August 1, 1996. Until August 1, 1996, the "safe harbor" provisions of Section 4204 precluded the Fund from attempting to assert secondary liability against Hunt.

The question is thus presented in this case as to whether this error by the Fund compels voiding the assessment against Hunt and requiring the Fund to start the assessment process anew or, instead, warrants the entry of other appropriate relief, including possible adjustments to be made to the Demand and schedule of payments sought by the Fund.

After careful consideration, I am unpersuaded that the Fund is obligated to rescind the withdrawal liability assessment and begin the process anew. It is not uncommon for a variety of errors to be identified in withdrawal liability assessments during the review process. If the errors can be cured by the issuance of a revised assessment, that process is preferred to starting the process anew. For example, if the date of withdrawal is found to be incorrect, but a withdrawal is determined to have occurred (perhaps even at a date after

the date of the assessment notice), the customary response is to remand the matter to the fund for the production of a correct assessment, not to void the entire matter, refund all payments (assuming interim payments have been made), and start the entire process anew.

Despite the finding that the Trustees were premature in their assessment against Hunt, Section 4204 provides for the imposition and assessment of "secondary" liability against sellers under certain circumstances. The nature of the Fund's claims against Hunt remains essentially the same now as it was on May 31, 1996—i.e., that Wintz has withdrawn from the Fund that Wintz's withdrawal took place prior to the end of the 5th plan year beginning after the sale; that Wintz has failed to make withdrawal liability payments after they were due; and that, accordingly, pursuant to Section 4204(a)(1)(C) and (a)(2), Hunt owes the Fund withdrawal liability in the amount that would have been due as a result of the Hunt's May 28, 1994 permanent cessation of contributions if the provisions of Section 4204 had not precluded the Fund from assessing withdrawal liability based upon that permanent cessation of contributions.

The stipulated record made clear that Fund assessed withdrawal liability against Wintz and that Wintz did not make interim payments, thereby failing to pay withdrawal liability when due. Notwithstanding the possible claim of Wintz (and perhaps Hunt) that Wintz never withdrew from the Fund, the Act contemplates that resolution of that issue is to proceed in accord with the Request for Review and arbitration processes of Sections 4219 and 4221 of the Act. I am unpersuaded that the Fund must wait until the issue of Wintz's withdrawal has been resolved withfinality through arbitration (and possibly the courts) prior to issuing its claim for secondary withdrawal liability against Hunt. There is no question that the assessment against Wintz was made in good faith and has some reasonable factual and legal basis. The

fact that Wintz was assessed withdrawal liability for a claimed withdrawal within the 5 plan year period identified in Section 4204(a)(2)(A) and has failed to make a payment when due is sufficient to permit the Fund to assess withdrawal liability against Hunt pursuant to Sections 4204(a)(1)(C) and (a)(2). I am unpersuaded that the provisions of Section 4204 contemplated requiring the Fund to wait years prior to assessing a Section 4204 seller with secondary withdrawal liability. If Congress intended that sequential process, it presumably would have plainly said so in the language of the Act. Instead, the provisions of Section 4204 permit the assessment of "secondary" withdrawal liability against Section 4204 sellers if the Section 4204 purchaser fails to make a single payment of assessed withdrawal liability when due. Questions relative to the date of withdrawal by Wintz (including whether a withdrawal took place during the five plan year period identified in Section 4204) are to be resolved through the review and arbitration processes, not by means of a preliminary challenge to the validity of the assessment itself.

It is clear that Wintz's withdrawal liability was assessed and due, notwithstanding its claims that it may not have withdrawn from the Fund or that the date of withdrawal was incorrect. The Act provides for the making of interim payments during the course of arbitral challenges to the validity of a withdrawal liability assessment. Wintz's failure to make those payments when due, coupled with the colorable claim of a withdrawal by Wintz during the 5 plan year period following the sale is sufficient to trigger Hunt's secondary liability under Section 4204 of the Act.

The fact that Wintz may yet satisfy some or all of its withdrawal liability cannot bar the imposition of withdrawal liability by the Fund against Hunt. The statutory trigger requires that Wintz fail to make "a payment" when due. Nor can Wintz's failure to make a payment on time in this case be

dismissed as *de minimis* in nature. Wintz has failed to date to make any of the required withdrawal liability payments. There is no reason to believe on the basis of the record in this case that the Fund will ever receive payment in full by Wintz of its withdrawal liability.

The Act contains no express provisions for an abatement or refund of some or all of Hunt's secondary withdrawal liability in the event that Wintz were to pay in full its withdrawal liability. A significant portion of the contribution base units upon which Hunt's liability is based were not included in Wintz's contribution history. Thus, not all of Hunt's liability overlaps with liability assessed against Wintz.

Even if it is assumed *arguendo*, however, that Hunt enjoys a claim to have its withdrawal liability refunded or reduced, in part, based upon Wintz ultimately paying off all owed withdrawal liability, the time to file such an application for refund/adjustment would be after any such payment action by Wintz. The issue has been timely, preserved by Hunt by raising the claim in the context of a timely initiated arbitration. That issue however is not yet ripe ruling. Any claim for such refund/reduction would depend upon the amount of payment by Wintz and no such payments have been made to date.

Should Hunt assert that Wintz did not withdraw from the Fund and that, as a result, the Section 4204(a)(2) trigger was not met, it is free to make that argument in this withdrawal liability arbitration. Any claim by Hunt that the condition set forth in Section 4204(a)(2) for the imposition of secondary withdrawal liability was not met because the Fund's determination that Wintz withdrew was in error is a defense on the merits which must be resolved in arbitration. In the interim, the Act provides that employers, such as Hunt, who challenge the propriety of withdrawal liability determinations must "pay first, dispute later" and make interim payments pending arbitration of its challenges.

It appears that the issue of the date of Wintz's withdrawal (and the question of whether, in fact there was a withdrawal) is an issue in Wintz's arbitration with the Fund. There may be practical reasons why Hunt and the Fund would prefer that this arbitration not be the first proceeding to litigate those contentions. First, the facts surrounding Wintz's alleged withdrawal would likely be possessed largely by Wintz, not Hunt. Second, Wintz appears to have adequate interest in litigating that matter, with the Fund. Nothing precludes the Fund and Hunt from awaiting the results of the Wintz arbitration and whatever facts are established therein regarding whether Wintz withdrew from the Fund and, if so, as of what date. Nor is there any bar on consolidating the two arbitrations should all Parties agree. Further, the potential for inconsistent fact-finding in multiple parallel proceedings is minimized by such an approach.

The proper means of correcting the Fund's error is to direct that the assessment be revised to reflect that the secondary liability of Hunt is not claimed until after Wintz failed to make a required withdrawal liability payment. Thus, the date on which liability is claimed from Hunt should be corrected to September 1996—a date one-month after the date on which Wintz's first withdrawal liability payment was due. By that date, it would have been clear to the Fund that Wintz failed to make its required payment.

It is well established that funds have the ability to revise withdrawal liability assessments after their initial issuance, including revisions which might increase the withdrawal liability amount claimed from employers. *See, e.g., Masters, Mates and Pilots Pension Plan v. USX Corporation*, 900 F.2d 727, 734-36 (4th Cir. 1990) (revision to withdrawal liability assessment made during the course of arbitration proceedings proper absent prejudice to the employer; decision of arbitrator and district court refusing to entertain the "late" amendment reversed).

There has been no showing that Hunt would be prejudiced by the adoption of such an approach in this matter. The interim payment amounts should be unaffected by the change in assessment date. Hunt has not been making interim payments so no partial refund need be considered although recalculation of the amount of overdue payments, with interest, may need to be made.

A number of the defenses which Hunt raised in its Brief and Reply Brief were not raised as issues in the pre-hearing conference in this arbitration. Those issues include the following:

> 1) whether Wintz withdrew and, if so, to determine the date of that withdrawal; the date of withdrawal is not significant with respect to the amount of Hunt's withdrawal liability, but is significant in terms of ascertaining whether Hunt owes secondary withdrawal liability and, if so, as of what date;
>
> 2) whether Hunt is entitled to a "credit" from its withdrawal liability if Wintz ultimately pays some or all of its withdrawal liability assessment and, if so, in what amount; this is premised upon a claim that to deny Hunt such a credit would result in "double recovery" by the Fund;
>
> 3) whether Hunt is entitled to "credit" due to the Fund's waiver of a bond from Wintz and, if so, in what amount; and
>
> 4) whether Hunt is entitled to a reduction of its secondary withdrawal liability due to Section 4225 of the Act (this claim is based upon the claimed application of Section 4225 to some, but not all, members of the Wintz controlled group).

With regard to the question of date of any withdrawal by Wintz, I am persuaded that Hunt must be afforded the opportunity to litigate that issue. This issue is related to the

objections to the Fund's assessment of secondary liability raised throughout this proceeding by Hunt—i.e., whether the conditions specified for imposition of secondary liability identified in Section 4204 have been met and, if so, as of what date—and is not truly a new issue to Hunt's challenge to its withdrawal liability assessment. Nor has the Fund shown prejudice by allowing this issue to be litigated in this arbitration.

The "credit" issue for withdrawal liability monies paid by Wintz, as noted, is premature, even if Hunt's basic contentions in this regard had merit. Not only does the record not support a finding that the Fund has reaped a windfall "double" recovery, the failure of Hunt and Wintz to make any payments makes clear that the Fund has not even recovered a "single" or "partial" recovery of the withdrawal liability that it has assessed under the Act due to the alleged permanent withdrawal of Wintz.

Moreover, as noted previously, I am unpersuaded that Hunt's basic legal premise—i.e., that it is entitled to a rebate/refund based upon Wintz's ultimate payment history—is consistent with the provisions of Section 4204 of the Act. The Parties have referenced no cases in which a seller in Section 4204 situation was properly assessed withdrawal liability due to the permanent closure of the covered operations and the failure of the buyer to make withdrawal liability payments when demanded and in which subsequent payments by the seller have been found to excuse retroactively and/or support a reduction in the withdrawal liability owed by the seller pursuant to Section 4204 of the Act. In light of this holding, it is unnecessary to consider whether this issue might also have been waived by not having raised it at an earlier point in the arbitration proceeding.

The claim by Hunt that the Fund's 1995 waiver of a purchaser's somehow prevents the assessment of secondary liability by the Fund against Hunt or requires some

adjustment to the amount of that liability specified in Section 4204 is unpersuasive as a matter of law. There simply is no language in Section 4204 which alters the secondary liability of a seller based upon whether the buyer's bond has been satisfied or not.

Nor may Hunt complain about that waiver after the fact. Hunt was notified in June of 1995 of the Fund's waiver of Wintz's bond. There is no evidence that Hunt advised the Fund at that time of its claim that it somehow had an interest in Wintz's submission or non-submission of that bond.

For both of these reasons, Hunt's claim related to the Fund's waiver of Wintz's bond is rejected on the merits. In light of that ruling, it is unnecessary to consider whether this issue might also have been waived by not having raised it at an earlier point in the arbitration proceeding.

The final claim for "credit" raised by Hunt relates to the possible application of Section 4225 to Wintz's withdrawal liability assessment. Whether Wintz is entitled to benefit from the provisions of Section 4225 is irrelevant to whether Hunt properly owes withdrawal liability to the Fund pursuant to Section 4204. Nor is the application of Section 4225 to Wintz relevant to the amount of withdrawal liability owed by Hunt under the provisions of Section 4204. The Arbitrator lacks the authority to rewrite the provisions of Section 4204 of the Act. The trigger for Hunt's "secondary" withdrawal liability under Section 4204, as well as the amount of that withdrawal liability are not affected by whether the withdrawal liability owed by Wintz and members of its controlled group are subject to reduction by virtue of Section 4225. The triggers for Hunt's liability to the Fund were the withdrawal of Wintz within the five year period identified in Section 4204 and Wintz's failure to make withdrawal liability payments when due. The amount of Hunt's secondary liability to the Fund is the amount of liability which Hunt would have owed if the permanent cessation of contributions and obligation to

contribute associated with its sale of the operations to Wintz had not been shielded against assessment due to the presence of a qualifying Section 4204 sale of assets transaction.

The date of August 5, 1998, which was tentatively held for hearing in the event that the Stipulated Record proved inadequate to allow ruling to be made on the contentions at issue in this case, is released. The Parties are to advise the Arbitrator if they wish to proceed in this arbitration at this time relative to Hunt's claim that Wintz did not withdraw or relative to Hunt's position on the date of any withdrawal by Wintz.

One final matter requires brief mention. Based upon the manner in which the issues have been litigated to date, as well as the rulings on these issues, arbitral fees and expenses and the administrative costs of the American Arbitration Association are assessed, on an interim basis, jointly and severally. No basis has been shown, to date, under the applicable PBGC Regulations or AAA Rules, to assess attorneys fees against either Party.

INTERIM AWARD

The Fund prematurely issued its notice and demand for withdrawal liability in this case. The appropriate remedy, however, in light of the totality of the facts present in this matter, is to direct the Fund to revise the assessment to comport with Section 4204, not to void the assessment and direct the Parties to begin anew the demand, request for review, and arbitration processes.

Nothing in Section 4204 requires the Fund to exhaust all collection efforts against Wintz prior to assessing Hunt with the "secondary" withdrawal liability that it owes pursuant to Section 4204.

The Fund is directed to issue a revised Demand, including a revised payment schedule, based upon the fact that Wintz

did not miss a payment to the Fund until August, 1996. Thus, the earliest date that a Demand to Hunt could have been issued seeking "secondary" withdrawal liability pursuant to Section 4204 of the Act would have been in mid August, 1996, and the first payment by Hunt would not have been due, therefore, until November 1, 1996.

Arbitration fees and expenses, including the administrative fees of the American Arbitration Association, are assessed, on an interim basis, jointly and severally against both Parties.

Jurisdiction remains to address any challenges properly raised by Hunt to the revised Demand.

The Parties are to advise the Arbitrator as to whether they intend to pursue at this time in this arbitration the question of the date of any withdrawal by Wintz from the Fund and the question of whether Wintz withdrew at all from the Fund.

June 23, 1998

/s/ Ira F. Jaffe
IRA F. JAFFE, Esq.
Impartial Arbitrator

AMERICAN ARBITRATION ASSOCIATION
CHICAGO, ILLINOIS

AAA Case No. 51 621 00017 97
Ira F. Jaffe, Arbitrator

IN THE MATTER OF THE ARBITRATION BETWEEN

HUNT TRUCK LINES, INC.,
Claimant,

and

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
Respondent.

STIPULATION

Hunt Truck Lines, Inc., and Central States, Southeast and Southwest Areas Pension Fund (the "Pension Fund") hereby stipulate that Central States Xpress, Inc. ceased covered operations and/or ceased to have an obligation to contribute to the Pension Fund on July 27, 1996, and therefore the Wintz controlled group effected a complete withdrawal from the Pension Fund on that date within the meaning of 29 U.S.C. § 1383. The Arbitrator's approval of this Stipulation serves to convert the Interim Award and Opinion of June 23, 1998 to the Final Award and Opinion in this matter as of the date of his signature.

HUNT TRUCK LINES, INC.

By: /s/ Herve H. Aitken, Jr.
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APPROVED:

/s/ Ira F. Jaffe, Esq.
IRA F. JAFFE
Impartial Arbitration Dated: October 14, 1998

Supreme Court, U.S.
FILED
MAY 8 2002
CLERK

No. 01-1473

IN THE

Supreme Court of the United States

HUNT TRUCK LINES, INCORPORATED,
AN IOWA CORPORATION,
Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,
AND HOWARD MCDOUGALL, TRUSTEE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Petitioner Hunt Truck Lines, Incorporated ("Hunt") has waived its argument that the Seventh Circuit should have applied the "five factor" test in resolving Hunt's claim for attorney fees pursuant to ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1), by failing to argue before the Seventh Circuit that there is any difference between the "five factor" test and the "special circumstances" test that the Seventh Circuit applied?

2. Whether the Seventh Circuit correctly construed the attorney fee provision of ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1), where it presumed that an award of attorney fees to the prevailing party (*i.e.*, Hunt) would be proper unless the losing party's position was "substantially justified," or "special circumstances make a fee award unjust" (Petitioner's Appendix, p. 5a), and the Seventh Circuit interpreted this legal standard as "making the same basic point" (*Id.*) as the "five factor" test now urged by the Petitioner before this Court?

3. Whether the Seventh Circuit correctly held that the district court's failure to follow Seventh Circuit precedent was an abuse of discretion?

CORPORATE DISCLOSURE

None of the Respondents has a parent corporation, and no public company owns stock in any corporation which is a Respondent.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE	ii
STATEMENT OF THE CASE	2
ARGUMENT	6
I. HUNT HAS WAIVED ITS ARGUMENT THAT IT WOULD HAVE PREVAILED UNDER THE "FIVE FACTOR" TEST	6
II. THERE IS NO MEANINGFUL CONFLICT IN THECIRCUITS ON THE ISSUE NOW RAISED BY HUNT	6
III. THE SEVENTH CIRCUIT CORRECTLY APPLIEDTHE "ABUSE OF DISCRETION" STANDARD.	8
CONCLUSION	9

TABLE OF AUTHORITIES

CASES — Page

Chicago Truck Drivers Pension Fund v. Rentar Indus., Inc., 951 F.2d 152 (7th Cir. 1991) 2
Chicago Truck Drivers Union Pension Fund v. Brotherhood Labor Leasing Corp., 207 F.3d 500 (8th Cir. 2000)..... 2
Cooter & Cell v. Hartmarx Corp., 496 U.S. 384, 110 S.Ct. 2447 (1990)..... 2
Galgary v. Beaverbrook Coal Company, 105 F.3d 137 (3d Cir. 1997)..... 6
Granifinanciera, S.A. v. Nordberg, 492 U.S. 33, 109 S.Ct. 2782 (1989)..... 6
Rashtabadi v. INS, 23 F.3d 1562 (9th Cir. 1994) .. 8
Van Fossen v. Dept. of Housing and Urban Dev., 798 F.2d 1579 (Fed. Cir. 1984)..... 8

STATUTES

29 U.S.C. § 1132(g)(1) ..... i, 1, 3, 6
29 U.S.C. § 1381..... 2
29 U.S.C. § 1401(d)..... 2

IN THE

Supreme Court of the United States

No. 01-1473

HUNT TRUCK LINES, INCORPORATED,
AN IOWA CORPORATION,
Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,
AND HOWARD MCDOUGALL, TRUSTEE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

JURISDICTION

The judgment of the court of appeals was entered on December 3, 2001. A petition for rehearing was denied on January 4, 2002. The petition for a writ of certiorari was filed on April 3, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

This case involves ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1), included in Appendix A hereto.

STATEMENT OF THE CASE

The Pension Fund brought this case as a claim for "interim payments" of statutory pension withdrawal liability. The Multiemployer Pension Plan Amendment Act of 1980 ("MPPAA"), 29 U.S.C. § 1381 *et seq.*, contains a provision requiring employers who have been notified of a withdrawal liability assessment by a multiemployer pension plan to commence payment of the assessment immediately, even if the employer wants to dispute the pension plan's assessment. 29 U.S.C. § 1401(d). MPPAA creates a mandatory arbitration procedure for resolving withdrawal liability disputes, but the employer must "pay now, and dispute later." *See, e.g., Chicago Truck Drivers Union Pension Fund v. Brotherhood Labor Leasing Corp.*, 207 F.3d 500, 505 (8th Cir. 2000); *Galgary v. Beaverbrook Coal Company*, 105 F.3d 137, 139 (3d Cir. 1997); *Chicago Truck Drivers Pension Fund v. Rentar Indus., Inc.*, 951 F.2d 152, 154-55 (7th Cir. 1991). To the extent the employer prevails in arbitration, it will be entitled to a refund of the interim payments of withdrawal liability it has made. *Id.*

The district court denied the Pension Fund's claim to recover the interim withdrawal liability payments requested under the initial notice and demand for payment issued to Hunt in this case. (Petitioner's Appendices ("App."), p. 84a.) The Seventh Circuit affirmed this ruling on the grounds that, in its view, the Pension Fund had eventually admitted that its initial notice and demand for payment of withdrawal liability was six weeks premature, *i.e.*, the Pension Fund had issued the demand for payment of withdrawal liability six weeks before Hunt had incurred a withdrawal. ("*Hunt I*," Petitioner's App., pp. 67a-68a.) The Pension Fund had contended that the issue of prematurity of the withdrawal liability assessment (whether ultimately conceded by the pension plan or not) was simply an issue that went to *merits* of the withdrawal liability dispute, and did not justify a deflection

from the "pay now, dispute later" procedure mandated by the statute. (Petitioner's App., p. 66a.) Nevertheless, in *Hunt I* the Seventh Circuit laid down a new rule whereby a claim for interim withdrawal liability payments should be denied if, prior to adjudication of the interim payment issue, the pension plan admits that its demand for payment was in any respect premature. (Petitioner's App., p. 68a.) This differed from the prior rule established under Seventh Circuit case law; that case law only excused the employer from interim payments if the employer could show (1) that the pension plan's withdrawal liability assessment was frivolous or "non-colorable," *and* (2) that the employer would be irreparably harmed by making the interim payments. (Petitioner's App., p. 8a.)

However, in *Hunt I*, the Seventh Circuit also noted that although it was excusing Hunt from payment of the Pension Fund's *initial* notice and demand, Hunt would be required to make payments under a *revised* notice and demand. (Petitioner's App., p. 71a.) The revised notice and demand was in the same amount as the initial notice, but there was a slight difference in the timing of the payments. (*Id.*, p. 65a.)

ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1), provides that attorney fees may be awarded to an employer who prevails against a pension plan in an action of this type. Upon remand from the Seventh Circuit in *Hunt I*, Hunt petitioned for fees under this statute. The district court noted that the Seventh Circuit uses two formulations of the legal test to determine whether to grant a fee award of this type: The "five factor" test (discussed at length in the Petition in this case, p. 11 *et passim*), and the "substantially justified" or "special circumstances" test. (Petitioner's App., pp. 12a-13a.) Under the latter test there is a presumption that the prevailing party is entitled to an attorney fee award, unless the losing party's position was not "substantially justified," or there are "special circumstances" that would make an award of fees unjust. (*Id.*)

The district court noted that these two formulations were "essentially the same." (Petitioner's App., p. 12a.) As the district court also observed, neither party raised any issue concerning the applicable legal standard. (Petitioner's App., p. 11a.)

The district court concluded that Hunt should be awarded attorney fees under *both* the "five factor" test and the "special circumstances" test. (Petitioner's App., p. 13a.) The district court reasoned that fees "are warranted largely because Central States was culpable in 'jumping the gun' and prematurely issuing the Notice and Demand." (*Id.*)

The Pension Fund appealed. As in the district court, Hunt did not raise any issue on this appeal concerning the controlling legal standard. Nor did Hunt argue in the Seventh Circuit that it made any difference whether the court used the "five factor" test as opposed to the "special circumstances" test. (Hunt's Brief on Appeal in *Hunt II*, Appendix B hereto, pp. 14a-25a.)

The Seventh Circuit applied the "abuse of discretion" standard of review (Petitioner's App., p. 5a) and reversed the district court's decision to award attorney fees to Hunt ("*Hunt II*," Petitioner's App., p. 10a). In reaching this decision in *Hunt II*, the Seventh Circuit reiterated its view that there was no essential difference between the "five factor" test and the "special circumstances" test. (*Id.* at 5a.) The Seventh Circuit also concluded that there were "special circumstances" overlooked by the district court which made an award of fees in favor of Hunt unjust. Despite the clear directive in *Hunt I* that Hunt would be required to pay under the *revised* notice and demand from the Pension Fund, Hunt had persisted in ignoring this directive. From this the Seventh Circuit concluded that "an award of fees [to Hunt] would do nothing but encourage the very foot-dragging and

avoidance of interim payment liability that the statute was designed to prevent, and thus would be 'unjust.'" (Petitioner's App., p. 6a.)

In *Hunt II*, the Seventh Circuit also concluded that the district court erred in ruling that the Pension Fund had no legitimate justification for the position it took in *Hunt I* and was acting in bad faith. The Seventh Circuit noted that *Hunt I* presented a novel fact pattern and produced a new legal standard for resolving withdrawal liability interim payments cases in the Seventh Circuit. Prior to *Hunt I*, the Seventh Circuit had held that an employer who wished to defeat an interim payments claim had to show (1) that the pension plan did not even have a colorable withdrawal liability claim on the merits, *and* (2) that the employer would suffer irreparable harm by being forced to comply with the interim payments schedule. (Petitioner's App., p. 7a.) *Hunt II* noted that *Hunt I* introduced a new legal standard by jettisoning the requirement for a showing of irreparable harm where the pension plan had by implication conceded that its payment demand was in any respect premature. (*Id.*) Hunt had never made a showing of irreparable harm, and therefore under the pre-*Hunt I* legal standard, the Pension Fund argued that—for this reason alone—it had presented a position that was at least "substantially justified." (*Id.* at 8a.) In *Hunt II*, the Seventh Circuit noted that the district court's opinion on the attorney fee issue had failed to account for this change in the legal landscape affected by *Hunt I*. (*Id.* at 7a.)

Hunt filed a petition for rehearing with the Seventh Circuit in *Hunt II*. (Petitioner's App., p. 31a.) However, Hunt's petition for rehearing did *not* argue that the Seventh Circuit erred because it applied the "special circumstances" test, as opposed to the "five factor" test. Hunt's Petition for Rehearing, like Hunt's Brief, assumed that these two formulations of the legal standard were equivalent. (*Id.*) Nor did Hunt's

Petition for rehearing suggest that the Seventh Circuit had in any manner diverged from other Circuits in its use of the "special circumstances" test. (*Id.*)

ARGUMENT

I. HUNT HAS WAIVED ITS ARGUMENT THAT IT WOULD HAVE PREVAILED UNDER THE "FIVE FACTOR" TEST.

At no point during the district court proceeding concerning attorney fees or the appeal in *Hunt II* did Hunt advance the argument that it is now making this Court, *i.e.*, that there is a difference between the "five factor" test and the "special circumstances" test, and that this difference is outcome determinative in this case. The issue of the difference (if any) between the "five factor" test and the "special circumstances" test was simply not raised or litigated in any way in the courts below. As the district court observed, "[t]he parties agree on the applicable standards." (Petitioner's App., p. 11a.) Therefore, Hunt should be deemed to have waived its argument, advanced for the first time in its Petition before this Court, that there is a significant difference between the two formulations of the legal standard for an attorney fee award under 29 U.S.C. § 1132(g)(1). *See, e.g., United States v. Pedro Alvarez-Sanchez*, 511 U.S. 350, 360 n. 5, 114 S.Ct. 1599, 1605 n. 5 (1994) (Supreme Court refuses to review a claim that was waived below); *Granifinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-39, 109 S.Ct. 2782, 2788-8 (1989).

II. THERE IS NO MEANINGFUL CONFLICT IN THE CIRCUITS ON THE ISSUE NOW RAISED BY HUNT.

Hunt's petition for a writ of certiorari asserts that "the opinion [of the district court] demonstrated that the district court used the five factor test." (Petition, p. 22, n. 5.) In fact, the district court used the "five factor" test and the "special

circumstances" test interchangeably; the court expressed its view that it simply did not make any difference which test was employed. (Petitioner's App., p. 13a.) The district court, like Seventh Circuit, viewed the two tests as essentially the same. (Petitioner's App., p. 4a, p. 12a.)

And Hunt's petition has not shown that there is any significant difference between the two tests, or that any such difference would have affected the outcome in this case. As the Seventh Circuit explained in *Hunt I*:

> We think these two formulations are alternative ways of making the same basic point: as we have put it before, "the bottom-line question is . . . .: was the losing party's position substantially justified and taken in good faith, or was that party simply out to harass its opponent."

(Petitioner's App., p. 5a (citation omitted).) To the extent there is any difference between the two tests, that difference *favored* Hunt. The "special circumstances" test gave Hunt (as the prevailing party in an ERISA case) the benefit of a presumption that it was entitled to attorney fees. Only if the Pension Fund could show that (1) its position was substantially justified in the underlying litigation, or (2) that there were other special circumstances making a fee award unjust, could the Fund rebut the presumption in favor of fees. Hunt is in no position to argue that the Seventh Circuit erred by applying a test that was overly indulgent to Hunt itself.

Given that there is no perceptible difference between the "special circumstances" test and the "five factor" test, at least as applied to the facts in this case, there is no conflict among the circuits. The Seventh Circuit's opinion in this case did not recognize that there was any such conflict, and that court saw the different verbal formulations of the legal standard as essentially reconcilable. Hunt is now asking this Court to fix something that isn't broken, and to resolve a non-issue.

III. THE SEVENTH CIRCUIT CORRECTLY APPLIED THE "ABUSE OF DISCRETION" STANDARD.

In this case the Seventh Circuit clearly acknowledged that it was reviewing the district court's attorney fee award under the "abuse of discretion" standard. (*Hunt II*, Petitioner's App., p. 5a.) Further, the Seventh Circuit correctly applied that standard.

First, the Seventh Circuit noted that the district court had made a legal error in its interpretation of Seventh Circuit case law. In analyzing the question of whether the Pension Fund's claim for interim withdrawal liability payments was "substantially justified" at the time it was originally brought, the district court failed to recognize that in *Hunt I* the Seventh Circuit was laying down a *new* rule of decision. (*Hunt II*, Petitioner's App., p. 8a.) Under pre-*Hunt I* case law, it appeared that the Pension Fund should have prevailed, if only because Hunt had failed to show that it would be irreparably harmed by complying with the interim payment schedule. (*Id.*) Therefore, the Seventh Circuit identified a significant error in the district court's legal reasoning. This constituted an abuse of discretion on the part of the district court. *See, e.g., Cooter & Cell v. Hartmarx Corp.*, 496 U.S. 384, 110 S.Ct. 2447, 2461 (1990) (discretion abused on erroneous view of law).

The Seventh Circuit also noted that the district court had failed to consider the significance of the fact that Hunt not only ultimately had a withdrawal liability payment obligation in the same principal amount initially claimed by the Pension Fund, but that Hunt had steadfastly refused to satisfy this obligation. (*Hunt II*, Petitioner's App., p. 6a.) "The failure to consider an important factor or to make a record of having considered it constitutes an abuse of discretion." *Rashtabadi v. INS*, 23 F.3d 1562, 1571 (9th Cir. 1994). *See also Van*

Fossen v. Dept. of Housing and Urban Dev., 798 F.2d 1579, 1580 (Fed. Cir. 1984) (failure to consider important circumstance is an abuse of discretion).

Therefore, the Seventh Circuit applied well settled standards in determining that the district court had abused its discretion in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

29 U.S.C. § 1132. Civil enforcement

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NO. 00-3922

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD MCDOUGALL, trustee,
Plaintiffs-Appellants,

v.

HUNT TRUCK LINES, INCORPORATED,
An Iowa corporation,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois,Eastern Division.
No. 96 C 5634
John A. Nordberg, Judge

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NO ORAL ARGUMENT REQUESTED

March 1, 2001

DISCLOSURE STATEMENT

The undersigned, as counsel for the Defendant-Appellee, furnishes the following responses in compliance with Seventh Circuit 26.1:

1. The undersigned represents Hunt Truck Lines, Inc.

2. The names of the law firms whose partners or associates have appeared for Hunt Truck Lines, Inc. in the case or are expected to appear in this court are: Thiemann Aitken & Vohra, LLC and McBride Baker & Coles.

3. Not applicable.

_____

Hervey H. Aitken
Attorney for Defendant-Appellee

TABLE OF CONTENTS

	Page
DISCLOSURE STATEMENT	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT CONCERNING ORAL ARGUMENT PURSUANT TO CIRCUIT RULE 34(f)	v
JURISDICTIONAL STATEMENT	1
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	3
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. JUDGE NORDBERG'S DECISION WAS NOT AN ABUSE OF DISCRETION	7
II. HUNT WAS THE PREVAILING PARTY BEFORE JUDGE NORDBERG ON CENTRAL STATES' CLAIM FOR INTERIM WITHDRAWAL LIABILITY PAYMENTS AND THERE ARE NO SPECIAL CIRCUMSTANCES THAT WOULD WARRANT OVERTURNING JUDGE NORDBERG'S AWARD	8
A. Hunt Was Indisputably The Prevailing Party In The The Interim Payments Case	9
B. There Are No Special Circumstances That Would Warrant Overturning Judge Nordberg's Award Of Attorneys' Fees To Hunt..	10

TABLE OF CONTENTS—Continued

		Page
III.	HUNT IS ENTITLED TO ITS ATTORNEYS' FEES BECAUSE CENTRAL STATES' INTERIM PAYMENTS COMPLAINT BEFORE JUDGE NORDBERG WAS NOT SUBSTANTIALLY JUSTIFIED	11
IV.	JUDGE NORDBERG'S AWARD OF ATTORNEY'S FEES TO HUNT WAS REASONABLE AND BALANCED	14
CONCLUSION		15

TABLE OF AUTHORITIES

CASES Page

Bittner v. Sadoff & Rudoy Indus., 728 F.2d 820 (7th Cir. 1984) 8
Bowerman v. Wal-Mart Stores, Inc., 226 F.3d 574 (7th Cir. 2000) 7
Central States Pension Fund v. Hunt Truck Lines, Inc., 204 F.3d 736 (7th Cir. 2000) 4
Central States Pension Fund v. Nitehawk Express, Inc., 223 F.3d 483 (7th Cir. 2000) .....v, 7, 10
Dhlamini v. AMR Corp., No. 98-3887, 2000 U.S. App. LEXIS 11851 (7th Cir. May 25, 2000 .....8, 10, 11, 13, 14, 15
Estate of Borst v. O'Brien, 979 F.2d 511 (7th Cir. 1992) 7
Libby v. Illinois High School Ass'n, 921 F.2d 96 (7th Cir. 1990) 7, 10, 11, 13, 14
Little v. Cox's Supermarkets, 71 F.3d 637 (7th Cir. 1995) 7, 8
Marvin Hayes Lines, Inc. v. Central States Pension Fund, 814 F.2d 297 (6th Cir. 1987) 12
Meredith v. Navistar Int'l Transp. Corp., 935 F.2d 124 (7th Cir. 1991) 13
Miller v. Artistic Cleaners, 153 F.3d 781 (7th Cir. 1998) 7
Miller v. United Welfare Fund, 72 F.3d 1066 (2nd Cir. 1995 8
Munson v. Friske, 754 F.2d 683 (7th Cir. 1985 7
Parker v. AH&L, Inc., No. 99-2679, 2000 U.S. App. LEXIS 5040 (7th Cir. Mar. 23, 2000) 9, 13
Trustees of the Chicago Truck Drivers Union Pension Fund v. Central Transport, Inc., 935 F.2d 114 (7th Cir. 1991) 13

TABLE OF AUTHORITIES

	Page
Trustees of the Chicago Truck Drivers Union Pension Fund v. Rentar Indus., Inc., 951 F.2d 152 (7th Cir. 1991)	12
STATUTES	
29 U.S.C. § 1132(a)(3)	2
29 U.S.C. § 1132(g)(1)	2, 3, 8, 9
29 U.S.C. § 1383	3
29 U.S.C. § 1384	1, 3
29 U.S.C. § 1451(a)(1)	2

STATEMENT CONCERNING ORAL ARGUMENT PURSUANT TO CIRCUIT RULE 34(f)

Defendant-Appellee, Hunt Truck Lines, Inc., pursuant to Circuit Rule 34(f), respectfully submits that oral argument is not appropriate in this case and would not assist the Court's decisional process. Federal Rule of Appellate Procedure 34(a)(2) provides that a Court may disallow oral argument if a panel of three judges agrees that oral argument is unnecessary for any of the following reasons: (1) the appeal is frivolous; (2) the dispositive issues have been authoritatively decided; or (3) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. This is one of those rare instances where all three reasons apply.

First, Central States' appeal of Judge Nordberg's award of attorneys' fees to Hunt is frivolous because Judge Nordberg rejected all of Central States' arguments to this Court, because Judge Nordberg did not abuse his discretion, and because Central States' legal arguments are meritless and are not well-grounded in the law. Additionally, Central States' appeal is frivolous where Central States was a party to the case of *Central States Southeast and Southwest Areas Pension Fund v. Nitehawk Express, Inc.*, 223 F.3d 483 (7th Cir. 2000), wherein this Court just last year held that an award of attorneys' fees to the prevailing party in an interim payments case was justified and within the district court's discretion despite the ultimate outcome of the withdrawal liability case.

Second, Judge Nordberg authoritatively decided the dispositive issues in this case. Judge Nordberg fully considered Central States' arguments opposing Hunt's motion for attorneys' fees, and thoroughly reviewed the facts of the case, including the extensive billing statements of counsel. After considering the relevant tests, Judge Nordberg determined that Central States' position in the litigation was not substantially justified and that Hunt was entitled to its attorneys'

fees and costs. Judge Nordberg also found that Central States' engaged in culpable conduct in the underlying litigation.

Third, the facts and legal arguments are adequately presented in the briefs and record, and the Court's decisional process, under an abuse of discretion standard, would not be aided by oral argument.

JURISDICTIONAL STATEMENT

Plaintiffs-Appellants' jurisdictional statement is complete and correct.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion by awarding Hunt its attorneys' fees?

2. Whether the attorneys' fees awarded to Hunt are reasonable?

STATEMENT OF THE CASE

This is an appeal from an Order of the district court (Order, District Judge John A. Nordberg, *Central States, et al. v. Hunt Truck Lines, Inc.*, 96 C 5634, entered October 26, 2000), which ordered Central States to pay Hunt Truck Lines, Inc. ("Hunt") $44,120 in attorneys' fees and $105. 49 in non-taxable costs on the first fee request; to pay Hunt $73,032 in attorneys' fees, $1,505.82 for computerized legal research, and $1,358.92 in non-taxable costs on the second fee request; and to pay Hunt $2,400 in attorneys' fees on the third fee request. Short Appendix attached to Brief of Appellants, page 02, hereinafter cited as "S.A. at __." The first fee request relates to the litigation in the district court. S.A. at 04. The second fee request consists of two parts: (i) fees relating to the appeal, and (ii) fees relating to the preparation of the first two fee requests. S.A. at 06. The third fee

request relates to fees for preparing a supplemental response memorandum to Appellants' supplemental memorandum. S.A. at 13.

On or about May 25, 1994, Hunt sold its assets to Wintz Parcel Drivers, Inc. ("Wintz"). S.A. at 34. Under Section 4204 of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1384, Hunt would only incur secondary withdrawal liability to Central States if, within five years of the sale of assets, Wintz made a withdrawal and then failed to make withdrawal liability payments. S.A. at 34.

On September 5, 1996, Central States filed an action seeking interim withdrawal liability payments from Hunt pursuant to ERISA Sections 502(a)(3) and 4301, 29 U.S.C. §§ 1132(a)(3) and 1451(a)(1), claiming that Wintz had withdrawn from Central States and that Hunt was therefore secondarily liable. S.A. at 34. The case was assigned to Judge Nordberg, and the parties filed cross-motions for summary judgment. *Id.*

After approximately 28 months of litigation, on January 12, 1999, Judge Nordberg granted Hunt's motion for summary judgment holding that Central States was not entitled to collect interim withdrawal liability payments because it had violated the jurisdictional prerequisites of the MPPAA by issuing a Notice and Demand for Payment of Withdrawal Liability to Hunt before a complete withdrawal by Wintz had occurred. S.A. at 33-38.

Shortly thereafter Hunt filed a motion before Judge Nordberg for attorneys' fees and costs, which, pursuant to ERISA section 502(g)(1), 29 U.S.C. § 1132(g)(1), may be awarded to either party in the court's discretion. S.A. at 03. On September 24, 1999, Judge Nordberg found that attor-

neys' fees were warranted. S.A. at 03-19. Judge Nordberg then directed the parties to brief the appropriate amount of fees to be awarded. S.A. at 19.

Meanwhile, on February 28, 2000, the Court of Appeals in a *de novo* review, affirmed Judge Nordberg's order and reasoning in granting Hunt's motion for summary judgment. S.A. at 20-26. Thereafter, Hunt filed its second fee request, which sought fees related to the appeal and to the preparation of the first two fee requests. S.A. at 04. Central States filed a response brief. S.A. at 07. Subsequently, Central States filed a motion for leave to file a supplemental brief. S.A. at 12. The district court granted Central States' motion and allowed Hunt to file a supplemental response. S.A. at 12.

On October 26, 2000, in a detailed 12-page decision, Judge Nordberg entered an Order awarding Hunt a cumulative $122,522.23 in attorneys' fees and costs for the three separate fee requests. S.A. at 03-14. Judgment was entered on October 31, 2000. S.A. at 01. Central States filed a notice of appeal on November 6, 2000, and that appeal is now before this Court.

STATEMENT OF FACTS

On or about May 25, 1994, Hunt sold its assets to Wintz. S.A. at 34. This sale of assets satisfied the criteria for such sales under 29 U.S.C. § 1384 and did not constitute a withdrawal from Central States. *Id.* On or about May 31, 1996, Central States issued a Notice and Demand for Payment of Withdrawal Liability to Hunt. *Id.* However, it was not until well after a month later—on or about July 27, 1996—that Wintz made a complete withdrawal from Central States within the meaning of 29 U.S.C. §1383. *Id.* Indeed, as represented in an Affidavit of Harry Keil, the Manager for Delinquent Accounts at Central States, dated February 13, 1997, and submitted to the district court in support of Central States' motion for summary judgment, Central States

determined that Wintz withdrew from Central States on or about July 20, 1996. Supplemental Appendix of Appellants previously filed with this Court in case number 99-1273 at page 25 (hereinafter cited as "App. at __."). The court stated that whether the date is July 27th or July 20th is unimportant because both dates are after the May 31, 1996 Notice and Demand. S.A. at 34.

After 28 months of litigation, Judge Nordberg granted Hunt's motion for summary judgment. S.A. at 38. Shortly thereafter, Hunt filed a motion for attorneys' fees and costs, which, pursuant to ERISA Section 502(g)(1), 29 U.S.C. § 1132(g)(1), may be awarded to either party in the court's discretion. S.A. at 03.

On September 24, 1999, Judge Nordberg found that attorneys' fees and costs were warranted. S.A. at 19. First, the court stated that it "has the discretion to grant Hunt, who indisputably was the prevailing party, reasonable attorneys' fees." S.A. at 16. The district court found that fees were warranted under both the "five factor" test and the "substantially justified" test because Central States was culpable in "jumping the gun" and prematurely issuing the Notice for Demand. S.A. at 17. The court found that Central States' initial culpability was exacerbated by its continued insistence on not terminating the case and re-issuing a valid notice and demand. S.A. at 17-18. In an effort to avoid the argument that it prematurely issued the notice, Central States also contradicted its own affidavit concerning the issue of the withdrawal. S.A. at 18, fn. 1. Simply stated, Central States could have terminated this case and re-issued a valid notice and demand. S.A. at 18. The court found that an award of attorneys' fees will serve to deter such culpable behavior. *Id.* Judge Nordberg also dismissed Central States' argument that the arbitrator and Judge Shadur concluded that Hunt was liable for final withdrawal liability by noting different concerns are at issue between interim and final withdrawal liability. *Id.*

On February 28, 2000, this Court in a *de novo* review, affirmed Judge Nordberg's order and reasoning in granting Hunt's motion for summary judgment. S.A. at 20-26. The Court of Appeals noted at the end of its opinion that Central States easily could have corrected its initial premature notice for demand by issuing a second timely notice: "Why didn't Central States save everyone a big headache and pursue this course of action a long, long time ago?" *Central States Pension Fund v. Hunt Truck Lines, Inc.*, 204 F. 3d 736, 743 (7th Cir. 2000). S.A at 26.

Hunt then filed its second fee request with the district court, which sought fees relating to the appeal and to the preparation of the first two fee requests. S.A. at 04. Central States argued that the fees and costs associated with both the appeal and the preparation of the fee requests were unreasonable and excessive. S.A. at 08. With regard to attorney fees associated with the second fee request, the court stated that it need not address most of Central States' objections because Hunt agreed to reduce its request to account for Central States' objections. S.A. at 09. As to costs, however, the court held that secretarial overtime and certain other costs were not justified. *Id.* With many modifications, the court noted that Hunt's second fee request has been reduced by almost $20,000.00. S.A. at 10. Further, the court reduced the attorney fee award by an additional $10,000.00. S.A. at 11. This resulted in a reduction of approximately 25% of the fees related to the second fee request. *Id.*

Finally, Central States filed a supplemental brief arguing that, although Hunt prevailed in the district court on interim withdrawal liability payments, it merely achieved a "pyrrhic victory" because Central States will recover final withdrawal liability payments from Hunt. S.A. at 12. The court was not persuaded by this argument and noted Central States was re-arguing a point already decided by the court: whether Central

States' position was substantially justified. *Id.* The court found that Central States was overlooking the important distinction it had already made several times between the separate questions of interim and final withdrawal liability. *Id.* The court stated that even if Hunt loses on the question of final withdrawal liability, it does not mean that Hunt was not the prevailing party on interim liability. *Id.* Lastly, regarding Hunt's third fee request, the court reduced Hunt's request from $11,100 in attorneys' fees and $671.50 in costs, to $2,400 in fees and zero in costs. S.A. at 13-14.

SUMMARY OF ARGUMENT

This appeal is frivolous because Judge Nordberg rejected all of Central States' arguments to this Court, because Judge Nordberg clearly did not abuse his discretion, and because Central States' legal arguments are meritless and not well grounded in the law. Central States' argument that Hunt was not a prevailing party was rejected below. S.A. at 16, and 12. Central States' argument that its position was substantially justified was rejected below. S.A. at 17, and 12-13. Central States' argument that there were special circumstances was also rejected below. S.A. at 17, and 07, fn. 4. Finally, Central States' argument that Hunt's fees were unreasonable was rejected below. S.A. at 8-11.

In his September 24, 1999, decision, Judge Nordberg fully considered Central States' arguments, and analyzed the relevant tests for determining whether an award of attorney's fees is appropriate. S.A. at 16-17. Judge Nordberg's holding that Hunt was entitled to its attorneys' fees and costs was reasonable and not an abuse of discretion.

In his October 26, 2000, decision, Judge Nordberg scrupulously reviewed each of counsel's monthly billings and non-taxable costs, and analyzed the reasonableness of each. Judge Nordberg's award of attorneys' fees and costs to

Hunt was reasonable and not an abuse of discretion. Without entertaining an equally thorough factual review, this Court cannot overturn Judge Nordberg's decisions.

The real motivation for Central States' appeal is stated in Appellants' brief: "[i]f the award of attorney's fees to Hunt is upheld, Central States will have to pay money to Hunt even though Hunt refuses to pay the withdrawal liability that is due." Brief of Appellants at 19. However, the issue of Hunt's final withdrawal liability is before another court and not before this Court on this appeal. Central States continues to refuse to "own up" to its intransigent refusal to reissue a timely notice and demand as lamented in this Court's decision, and proceed in the proper statutory manner as directed by Judge Nordberg. S.A. at 26, 38. For these reasons, Judge Nordberg found that Central States' conduct in the underlying litigation was culpable. S.A. at 17-18.

Additionally, Central States' appeal of Judge Nordberg's award of attorneys' fees to Hunt is frivolous where Central States was a party to *Central States Southeast and Southwest Areas Pension Fund v. Nitehawk Express, Inc.*, 223 F.3d 483 (7th Cir. 2000), wherein this Court just last year held that an award of attorneys' fees to the prevailing party in an interim payments case is justified and within the district court's discretion despite the ultimate outcome of the withdrawal liability case. For these reasons, this Court should issue an immediate decision affirming Judge Nordberg's order.

ARGUMENT

I. JUDGE NORDBERG'S DECISION WAS NOT AN ABUSE OF DISCRETION.

This Court reviews a district court's decision to award attorneys' fees for an abuse of discretion. *Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574 (7th Cir. 2000). This Court has held that "[a]n abuse of discretion generally only occurs where no reasonable person could take the view adopted by

the trial court. . . . If reasonable persons could differ, then the appellate court will not be able to find an abuse of discretion." *Libby v. Illinois High School Ass'n*, 921 F.2d 96, 98 (7th Cir. 1990) (emphasis added) (citing *Munson v. Friske*, 754 F.2d 683 (7th Cir. 1985); *see also Little v. Cox's Supermarkets*, 71 F.3d 637 (7th Cir. 1995).

This Court has found that it owes a high degree of deference to a district court's determination of whether to award attorney's fees for three reasons:

> First, the district court has a "superior understanding of the litigation and [we] desir[e to] avoid [] frequent appellate review of what are essentially factual matters." Second, the need to achieve uniformity in attorney's fees awards is not so compelling as to justify a high level of scrutiny. Finally, deference assists us in avoiding satellite litigation solely on fees.

Miller v. Artistic Cleaners, 153 F.3d 781, 784 (7th Cir. 1998) (emphasis added) (inner citations omitted); *see also Estate of Borst v. O'Brien*, 979 F.2d 511, 514 (7th Cir. 1992) ("We can think of few matters more wasteful of judicial resources than ancillary litigation over an attorneys' fee award.").

Attorney's fee awards are difficult determinations that are entrusted to the district court's discretion. *Cox's Supermarkets*, 71 F.3d at 645. Therefore, this Court has recognized that, "[u]nder this standard of review we will uphold any exercise of the district court's discretion that could be considered reasonable, even if we might have resolved the question differently ourselves." *Dhlamini v. AMR Corp.*, No. 98-3887, 2000 U.S. App. LEXIS 11851, at *5 (7th Cir. May 25, 2000) (emphasis added) (Court affirmed district court's award of attorney's fees).

Therefore, even if this Court were to find for Central States on any of the legal issues, it must also determine that no

reasonable person could have taken the view of Judge Nordberg in order to reverse on an abuse of discretion standard. This it simply cannot do.

II. HUNT WAS THE PREVAILING PARTY BEFORE JUDGE NORDBERG ON CENTRAL STATES' CLAIM FOR INTERIM WITHDRAWAL LIABILITY PAYMENTS AND THERE ARE NO SPECIAL CIRCUMSTANCES THAT WOULD WARRANT OVERTURNING JUDGE NORDBERG'S AWARD OF ATTORNEYS' FEES TO HUNT.

ERISA provides that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1) (emphasis added); *see also Miller v. United Welfare Fund*, 72 F.3d 1066 (2nd Cir. 1995). It has been established that "the district court also entertains a 'modest presumption' that prevailing parties are entitled to a reasonable attorney's fee." *Cox's Supermarkets*, 71 F.3d at 645, citing *Bittner v. Sadoff & Rudoy Indus.*, 728 F.2d 820 (7th Cir. 1984) (emphasis added). However, this Court has also found that this presumption may be rebutted if "special circumstances make an award unjust." *Bittner*, 728 F.2d at 830.

Judge Nordberg had discretion to award attorneys' fees to Hunt regardless of its prevailing party status. 29 U.S.C. § 1132(g)(1). Nevertheless, Central States has attacked Hunt's prevailing party status claiming that Hunt has achieved only a pyrrhic victory. Brief of Appellants at 14. It is indisputable, however, that Hunt was the prevailing party in the case before Judge Nordberg, and there are no special circumstances that would warrant overturning the award of attorneys' fees to Hunt.

A. Hunt Was Indisputably The Prevailing Party In The Interim Payments Case.

On January 12, 1999, Judge Nordberg granted Hunt's Motion for Summary Judgment and denied Central States' cross-motion. S.A. at 38. In the district court's September 24, 1999, order holding that Hunt was entitled to its attorneys' fees and costs, Judge Nordberg noted, "[t]his court has the discretion to grant Hunt, who indisputably was the prevailing party, reasonable attorneys' fees." S.A. at 16 (emphasis added). Furthermore, Judge Nordberg found that, "even if Hunt ultimately loses on the question of final withdrawal liability, that does not mean that it was not the prevailing party with regard to the question of interim withdrawal liability." S.A. at 12.

This Court has noted, "[a] party prevails if it 'gets substantial relief . . . even if it doesn't win on every claim.'" *Parker v. AH&L, Inc.*, No. 99-2679, 2000 U.S. App. LEXIS 5040, at *5 (7th Cir. Mar. 23, 2000). In the case before Judge Nordberg, Hunt obtained the precise relief it was seeking: a finding that Central States was not entitled to collect interim withdrawal liability payments because it had violated MPPAA's jurisdictional and procedural prerequisites. It is indisputable that Hunt was the prevailing party in the case before Judge Nordberg.

Further, Central States cannot characterize Hunt's victory as *de minimus* because Judge Nordberg's decision will significantly impact future MPPAA cases, and will deter future MPPAA violations and culpable conduct by pension funds. S.A. at 18. More importantly, Central States' argument is irrelevant because this Court has recognized that actions to collect interim withdrawal liability payments are entirely separate from an arbitrator's determination on the merits of withdrawal liability. *Nitehawk Express, Inc.*, 223

F.3d at 496. In *Nitehawk Express*, to which Central States was a party, this Court held:

> . . . an interim payment order [is] a *final* order on the limited issue of which party gets to hold the stakes during an arbitration. . . . So the interim payment accomplishes a goal entirely different from the arbitration on the merits. As such, the Fund's victory in securing interim payments cannot be undone by a loss at the merits stage. Therefore, the district court did not have discretion to vacate the award of attorney's fees for [the interim payment] portion of the litigation.

223 F.3d at 496 (emphasis added). This Court's holding in *Nitehawk* is exactly on point in this case, and this Court must affirm Judge Nordberg's award of attorney's fees to Hunt in the interim payments case, regardless of Central States' ultimate success on the merits in arbitration. Even if the Court disagrees with Judge Nordberg's decision, this Court cannot find an abuse of discretion because a reasonable person could have found as Judge Nordberg did. *See Libby*, 921 F.2d at 98; *see also Dhlamini*, 2000 U.S. App. LEXIS 11851, at *5.

B. There Are No Special Circumstances That Would Warrant Overturning Judge Nordberg's Award of Attorneys' Fees To Hunt.

In its brief, Central States claims: (1) that the underlying merit of its withdrawal liability assessment and (2) Hunt's non-payment of withdrawal liability to Central States are "special circumstances" that make an award of attorneys' fees to Hunt inappropriate. Brief of Appellants at 18 and 19.

With respect to Central States' first claim, this Court has recognized that actions to collect interim withdrawal liability payments are entirely separate from an arbitrator's determination on the merits of withdrawal liability. *See Nitehawk*

Express, Inc., 223 F.3d at 496. Therefore, this Court must affirm Judge Nordberg's award of attorney's fees to Hunt in the interim payments case, regardless of the ultimate merit of Central States' withdrawal liability assessment.

With respect to Central States' second claim, Judge Nordberg noted:

> What Central States really seems to be complaining about is the fact that Hunt has continued to resist liability for withdrawal payments in the case before Judge Guzman. . . . That is a matter before Judge Guzman and, as we have said, is separate from the issue that was before this court.

S.A. at 12-13. Therefore, there are no special circumstances that would warrant overturning the award of attorneys' fees to Hunt. Moreover, Judge Nordberg found that Central States' complaint for interim withdrawal liability payments was not brought in good faith, but rather that:

> . . . Central States was culpable in "jumping the gun" and prematurely issuing the Notice for Demand. The initial culpability was exacerbated by the continued insis tence on this position in this litigation. Simply stated, Central States could have terminated this case and re-issued a valid notice and demand. An award of attorneys' fees will serve to deter such culpable behavior . . ."

S.A. at 17-18. Central States' position in the underlying litigation before Judge Nordberg was blameworthy and not in good faith. Thus, this court should affirm the award of attorneys' fees to Hunt. Additionally, even if the Court disagrees with Judge Nordberg's decision, it cannot find an abuse of discretion because a reasonable person could have found as Judge Nordberg did. *See Libby*, 921 F.2d at 98; *see also Dhlamini*, 2000 U.S. App. LEXIS 11851, at *5.

II. HUNT IS ENTITLED TO ITS REASONABLE ATTORNEYS' FEES BECAUSE CENTRAL STATES' INTERIM PAYMENTS COMPLAINT BEFORE JUDGE NORDBERG WAS NOT SUBSTANTIALLY JUSTIFIED.

In its brief before this Court, Central States argues that its litigation position in the case before Judge Nordberg was substantially justified because Central States had relied on a Sixth Circuit opinion that found Central States was entitled to interim withdrawal liability payments notwithstanding the fact that Central States' notice and demand to the employer in that case was premature in that it was issued prior to the employer's withdrawal. Brief of Appellants at 11 and 17, citing to *Marvin Hayes Lines, Inc. v. Central States Pension Fund*, 814 F.2d 297 (6th Cir. 1987). However, Central States did not rely on *Marvin Hayes* even once in its briefs before Judge Nordberg in support of its motion for summary judgment prior to his decision on January 12, 1999, granting Hunt's motion for summary judgment. App. at pages 12-22, 104-109, 172-176, and 307-317. Moreover, Central States did not rely on *Marvin Hayes* in its any of its briefs filed prior to Judge Nordberg's September 24, 1999, order, finding Hunt was entitled to its attorneys' fees and costs. Record on Appeal item numbers 91, 104, and 116 (hereinafter "Record item __.").

In fact, Central States first proposed this theory of reliance on *Marvin Hayes* in a supplemental memorandum filed on June 8, 2000, after Judge Nordberg had issued his September 24, 1999, order holding that Hunt was entitled to its attorneys' fees and costs. Record item 124. Therefore, Central States' claims are absolutely false: Central States' did not rely on *Marvin Hayes* in the interim payments litigation, and did not rely on *Marvin Hayes* in the attorneys' fee litigation before Judge Nordberg prior to his September 24, 1999, order finding that Hunt was entitled to attorneys' fees. Central States' penchant for insisting on indefensible posi-

tions in this litigation (S.A. at 17-18) and then misrepresenting its original position in this appeal (Brief of Appellants at 11 and 17) is grossly improper and reprehensible.

Central States also claims that its interim payments complaint and litigation position before Judge Nordberg were substantially justified because it had relied on *Trustees of the Chicago Truck Drivers Union Pension Fund v. Rentar Indus., Inc.*, 951 F.2d 152 (7th Cir. 1991) and *Trustees of the Chicago Truck Drivers Union Pension Fund v. Central Transport, Inc.*, 935 F.2d 114 (7th Cir. 1991). However, in his decision, Judge Nordberg correctly determined that Central States' position was not substantially justified after analyzing the issues using the two tests espoused by this Court. Judge Nordberg accurately cited the two tests used in this Circuit to determine whether reasonable attorneys' fees should be awarded in this context: the "five factor" test and the "substantially justified" test. S.A. at 16-18; *see also Meredith v. Navistar Int'l Transp. Corp.*, 935 F.2d 124, 128 (7th Cir. 1991). Judge Nordberg also noted that this Court has stated that "[w]hichever approach is used, the bottom-line question is essentially the same: was the losing party's position substantially justified and taken in good faith, or was that party simply out to harass its opponent?" S.A. at 17; *see also Meredith*, 935 F.2d at 128.

In holding that Hunt was entitled to its attorneys' fees and costs, Judge Nordberg found:

> Under both of these tests ["five factor" test and "substantially justified" test] this court finds that Hunt should receive reasonable attorneys' fees. . . . This court finds that fees are warranted largely because Central States was culpable in "jumping the gun" and prematurely issuing the Notice for Demand. The initial

culpability was exacerbated by the continued insistence on this position in this litigation.

S.A. at 17-18; *see also Parker v. AH&L, Inc.*, No 99-2679, 2000 U.S. App. LEXIS 5040, at *5-6 (7th Cir. Mar. 23, 2000) (Court found no abuse of discretion where judge considered relevant tests). Judge Nordberg fully considered the relevant tests for determining whether to award attorney's fees. Even if this Court disagrees with Judge Nordberg's decision, it cannot find an abuse of discretion because a reasonable person could have found as Judge Nordberg did. *See Libby*, 921 F.2d at 98; *see also Dhlamini*, 2000 U.S. App. LEXIS 11851, at *5.

III. JUDGE NORDBERG'S AWARD OF ATTORNEYS' FEES TO HUNT WAS REASONABLE AND BALANCED.

The amount of attorneys' fees awarded to Hunt was reasonable. Altogether, Judge Nordberg reduced Hunt's fees and costs by about $40,000 after reviewing hundreds of pages of invoices. S.A. at 6, 10-11, 13-14. In its October 26, 2000, order awarding Hunt its attorney's fees and costs, Judge Nordberg noted that in Hunt's first fee request, non-taxable costs were discounted by 80 percent in the months in which counsel billed for the Nordberg litigation to discount for the possibility of including any costs attributable to the litigation before Judge Shadur. S.A. at 04. Judge Nordberg ultimately reduced Hunt's first request by $1,116.73. S.A. at 06. In addition, Judge Nordberg reduced Hunt's second fee request by almost $20,000. S.A. at 10. Further, Judge Nordberg also reduced the second fee request by an additional $10,000 in response to Central States' general objection that the overall amount was too much. S.A. at 11. Finally, Judge Nordberg reduced Hunt's third fee request from $11,100 to $2,400, and disallowed $671.50 in non-taxable costs. S.A. at 13-14.

Judge Nordberg substantially reduced Hunt's fee requests; therefore, the award was more than reasonable and Judge Nordberg did not abuse his discretion. This Court cannot substitute its decision for the diligent review and analysis conducted by Judge Nordberg in granting the attorneys' fees and costs at issue here. Furthermore, even if the Court disagrees with Judge Nordberg's decision, it cannot find an abuse of discretion because a reasonable person could have found as Judge Nordberg did. *See Libby*, 921 F.2d at 98; *see also Dhlamini*, 2000 U.S. App. LEXIS 11851, at *5.

CONCLUSION

Judge Nordberg did not abuse his discretion when he determined that Hunt was the prevailing party and that there were no special circumstances that would rebut the presumption that Hunt is entitled to its reasonable attorneys' fees and costs. Judge Nordberg considered Central States' culpable conduct under the relevant tests to determine whether an award of attorney's fees was appropriate, and held that under both tests Hunt was entitled to attorneys' fees and costs. This Court recently held that ". . . we will uphold any exercise of the district court's discretion that could be considered reasonable, even if we might have resolved the question differently ourselves." *Dhlamini*, 2000 U.S. App. LEXIS 11851, at *5.

For all of the foregoing reasons, no oral argument is required here, and this Court should affirm Judge Nordberg's judgment of October 31, 2000.

Respectfully submitted,

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No. 01-1473

IN THE

Supreme Court of the United States

HUNT TRUCK LINES, INCORPORATED,
An Iowa Corporation,
Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,
and HOWARD MCDOUGALL, trustee,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

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15 pg

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	2
I. THE SEVENTH CIRCUIT'S RULE IS SUBSTANTIVELY DIFFERENT FROM THE RULE OF ALL OTHER CIRCUITS	2
II. THERE IS A MEANINGFUL CONFLICT BETWEEN THE SEVENTH CIRCUIT'S APPLICATION OF THE SUBSTANTIAL JUSTIFICATION AND THE SPECIAL CIRCUMSTANCES TESTS, AND THE APPLICATION OF THE FIVE-FACTOR TEST BY THE MAJORITY OF CIRCUITS	4
III. HUNT DID NOT WAIVE ITS ARGUMENT THAT THE SEVENTH CIRCUIT SHOULD APPLY THE FIVE-FACTOR TEST AS ADOPTED BY THE MAJORITY OF CIRCUITS	7
IV. THE SEVENTH CIRCUIT'S DECISION DEFIES THIS COURT'S DECISION IN *COOTER & GELL V. HARTMARX CORP*	8
A. There was no error of law	8
B. There was no clearly erroneous assessment of evidence	9
CONCLUSION	10
APPENDIX	1a

TABLE OF AUTHORITIES

CASES — Page

Anderson v. Vessemer City, 470 U.S. 564 (1985) 10

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) 8, 10

Gary v. New England Tel. and Tel. Co., 792 F.2d 251 (1st Cir. 1986) 3

STATUTES

29 U.S.C. § 1132(g)(1) 2, 3

29 U.S.C. § 1381(a) 8, 1a

29 U.S.C. § 1382 ..... 8, 9, 1a

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PETITIONER'S REPLY BRIEF

Petitioner, Hunt Truck Lines, Inc. ("Hunt") submits this Reply Brief to address the matters asserted in the Brief in Opposition filed by Respondents, Central States Southeast and Southwest Areas Pension Fund and Howard McDougall, trustee (collectively referred as "Central States").

The heart of this litigation is that Central States violated the most fundamental procedural due process requirement of ERISA by commencing a lawsuit to collect interim withdrawal liability payments before it had issued a proper Notice for Demand for Payment of Withdrawal Liability ("Notice and Demand") to Hunt. Central States **knew** its litigation was six weeks premature, and as the district court found, Central States went so far as to "contradict its own

affidavit concerning the issue of withdrawal" (Petitioner's App. at 13a, n.1), in a futile effort to salvage its lawsuit. Central States steadfastly refused to terminate this case and issue a valid Notice for Demand compounding its initial error. Instead, Central States, with $17 billion in assets and unlimited legal resources, caused Hunt to needlessly incur more than $100,000.00 in legal defense costs to secure its procedural rights guaranteed by the federal statute. Given these facts, the district court awarded attorneys' fees to Hunt under the five-factor test. However, the Seventh Circuit reversed it by applying both the substantial justification and special circumstances tests.

In the Petition for Certiorari, Hunt requests this Court to grant its petition because: (1) there is a substantive split among the circuits in reviewing lower courts' decisions to grant or deny attorneys' fees under 29 U.S.C. § 1132(g)(1); and (2) the Seventh Circuit erroneously reversed the district court's determination by substituting its own view for the district court's view in violation of this Court's precedent.

Central States argues that these tests are essentially the same, are not outcome determinative, and, as these tests are applied to the present case, there is no meaningful conflict among the circuits. Respondent's Brief in Opposition, at 6 to 7. Considering that Central States argued that the court should adopt the substantial justification test rather than the five-factor test (Petitioner's App. at 13a), Central States' position is self-contradictory. Central States obviously believed the former test favored its position. As will be discussed here, the three tests are different, and in fact, created different results.

I. THE SEVENTH CIRCUIT'S RULE IS SUBSTANTIVELY DIFFERENT FROM THE RULE OF ALL OTHER CIRCUITS.

The majority of the circuits adopt the five-factor test in determining whether to grant or deny attorneys' fees under 29

U.S.C. § 1132(g)(1). Petition for Certiorari, at 11 to 13. Under this test, a district court's decision to grant or deny attorneys' fees is determined based on five factors: (1) the opposing party's culpability or bad faith; (2) the ability of the opposing party to satisfy an award of attorneys' fees; (3) the deterrent effect of an award of attorneys' fees against the opposing party; (4) whether the party requesting fees sought . . . to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions. Petitioner's App. at 12a.

In contrast, the substantial justification test requires a court to review only the last factor of the five factors because it allows a court to deny attorneys' fees when the opposing party's position is substantially justified. It does not require an analysis of the first four factors, three of which test the opposing party's culpability, conduct and ability to pay. In rejecting the substantial justification test, the First Circuit in *Gary v. New England Tel. and Tel. Co.*, 792 F.2d 251 (1st Cir. 1986) stated that, although there is similarity between ERISA and EAJA, "a **multi-faceted approach** [five-factor test] is more desirable when fees are to be assessed against parties other than the United States." *Gary*, 792 F.2d at 259 (emphasis added). Clearly, the application of one factor, as opposed to five, to determine whether to grant or deny attorneys' fees invites subjectivity, misuse or abuse of discretion. None of the circuits, except for the Seventh Circuit, applies the substantial justification test in determining attorneys' fees under 29 U.S.C. § 1132(g)(1).

Under the special circumstances test, a court would grant attorneys' fees to a prevailing party unless there are special circumstances that render a fee award unjust. Except for the Seventh, Eighth and Ninth Circuits, all of the other circuits strictly follow the five-factor test. Further, in the Eighth and Ninth Circuits, the special circumstances exception is available only for prevailing plan beneficiaries. Only the

Seventh Circuit uses the special circumstances test as a presumption favoring defendant employers. However, once again, contrary to the objective guidelines provided by the multi-faceted five-factor test, the special circumstances test subjectively allows the court to look at any factors it deems relevant. The special circumstances test does not require an analysis of the opposing party's culpability, conduct and ability to pay. This begins to explain how the special circumstances test, as applied in this case, could deny Hunt its attorneys' fees, despite the rule's presumption favoring a grant of attorneys' fees to Hunt.

II. THERE IS A MEANINGFUL CONFLICT BETWEEN THE SEVENTH CIRCUIT'S APPLICATION OF THE SUBSTANTIAL JUSTIFICATION AND THE SPECIAL CIRCUMSTANCES TESTS, AND THE APPLICATION OF THE FIVE-FACTOR TEST BY THE MAJORITY OF CIRCUITS.

As Central States argues, it is true that the Seventh Circuit views these two tests as the same because the Seventh Circuit allows its district courts to use any of these tests. Petitioner's App. at 5a. However, it is the application of the substantial justification and the special circumstance tests by the Seventh Circuit which is **in conflict with** the rule of the majority circuits.

In this case, the application of different tests brought different results. The district court made proper findings under the five-factor test. *Id.* at 12a to 13a. In awarding attorneys' fees, the district court concluded:

> [F]ees are warranted largely because Central States was culpable in "jumping the gun" and prematurely issuing the Notice for Demand. The initial culpability was exacerbated by the continued insistence on this position in this litigation.[1] Simply stated, Central States could

have terminated this case and re-issued a valid notice and demand. An award of attorneys' fees will serve to deter such culpable behavior and will serve to heighten the concern for adhering to the statutory framework, which, as we previously have noted, gives Central States (and others like it) a significant power to unilaterally demand interim payments.

---

[1] In an effort to avoid the argument that it prematurely issued the notice, Central States also contradicted its own affidavit concerning the issue of the withdrawal.

Id. at 13a. The district court properly applied the five-factor test and found that Central States was culpable in "jumping the gun," by prematurely issuing the Notice for Demand in violation of the statutory pre-requisite (factor 1); there was no question that Central States has the ability to pay attorneys' fees (factor 2); the award of the attorneys' fees would "deter" this culpable behavior by Central States (factor 3); the fee award would serve to heighten the concern for adhering to the statutory framework (factor 4); and Central States' position in the litigation was not justified, because Central States "could have terminated this case by simply re-issuing a valid notice" instead of continuing this unlawful litigation against the employer (Hunt) for interim payments (factor 5). Petition for Certiorari, at 22 to 23.

As applied to this case, the five-factor test relied on by the district court warranted a fee award to Hunt, and, according to the Seventh Circuit, the substantial justification and the special circumstances tests did not. Clearly, the Seventh Circuit's use of different tests resulted in a different outcome.

In applying the substantial justification test, the Seventh Circuit simply used one factor of the five factors, namely the relative merits of the parties' position (fifth factor). Considering that the district court emphasized the culpability of the losing party, Central States, a criteria in the first, third and

fourth factors, the Seventh Circuit's decision highlights the difference between the five-factor test and the substantial justification test because the Seventh Circuit did not address the culpability of Central States.

With regard to the special circumstances test, the difference is even more significant. Here, the district court's five-factor test properly focused on the losing-plaintiff Central States' conduct regarding its culpability in "jumping the gun" and prematurely issuing the Notice for Demand. In contrast, the Seventh Circuit improperly shifted the focus to the conduct of the prevailing party, Hunt, suggesting Hunt's defense was merely footdragging to avoid paying final withdrawal liability. This shift in focus on conduct is the essence of the fundamental difference between the five-factor test and the Seventh Circuit's application of the special circumstances test. That is, the five-factor test provides an objective analysis focused on the losing party, Central States' conduct, while the Seventh Circuit used the special circumstances test to focus on the prevailing party, Hunt's conduct, avoiding any focus on Central States' culpability.[1]

Simply put, the Seventh Circuit held that Central States' "knowing" violation of ERISA's due process procedure (Petitioner's App. at 68a to 69a) does not provide a basis for awarding attorneys' fees because the court believed that ultimately Hunt would have to pay withdrawal liability. In essence, the Seventh Circuit felt the end result of securing withdrawal liability payments could justify or excuse the "illegal means" used.

While ERISA grants significant power to a pension fund to unilaterally demand interim payments, Central States abused this power by knowingly issuing a premature notice. *Id.* By

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[1] This is a significant shift because it was patently incorrect for the Seventh Circuit to conclude that Hunt's conduct in seeking to dismiss this unlawful complaint, which Hunt prevailed upon, constituted misconduct.

reversing the district court's decision under the substantial justification and the special circumstances tests, the Seventh Circuit imposed a subjective analysis that focused on the conduct of the prevailing party, Hunt, while ignoring three of the five factors in the five-factor test which focus on the culpability of the losing party, Central States. This one-sided selective analysis undermines the objective guidance provided by the five-factor test. Clearly, as applied in this case, there is a meaningful conflict between the Seventh Circuit's application of the substantial justification and the special circumstances tests, and the application of the five-factor test by the majority of circuits that warrants this Court's review.

III. HUNT DID NOT WAIVE ITS ARGUMENT THAT THE SEVENTH CIRCUIT SHOULD APPLY THE FIVE-FACTOR TEST AS ADOPTED BY THE MAJORITY OF THE CIRCUITS.

Central States' claim that Hunt waived its argument that the five-factor test should be applied is incorrect. The district court's opinion noted that "Central States favors the "substantially justified" test and Hunt favors the "five-factor" test," and held that under both of these tests, Hunt should receive reasonable attorneys' fees. *Id.* at 13a. Hunt presented its argument as to the differences of these tests to the court. Hunt did not vigorously dispute that the Seventh Circuit should not use the substantial justification or the special circumstances tests because the district court held Hunt prevailed under both tests. Accordingly, Hunt did not waive this argument.

IV. THE SEVENTH CIRCUIT'S DECISION DEFIES THIS COURT'S DECISION IN *COOTER & GELL v. HARTMARX CORP.*

This Court in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) held that when the standard of review is abuse of discretion, an appellate court cannot substitute its view for the district court's view, and a district court can be reversed only, "if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Here, the Seventh Circuit defies this Court's rule by reversing the district court's decision even though the district court did not base its ruling on an erroneous view of the law, or on a clearly erroneous assessment of the evidence.

A. There was no error of law.

Central States argues that prior to *Hunt I*, the Seventh Circuit's decisions allowed a pension fund to collect interim payments unless the employer showed: (1) the fund lacked a colorable claim; and (2) the employer would suffer irreparable harm. Accordingly, because Hunt did not make either argument, the Seventh Circuit was correct in determining that Central States' reliance on this pre-*Hunt I* rule provided substantial justification to its position. Respondent's Brief in Opposition, at 3.

This argument misstates the law. Under the clear statutory law, Central States had no **legal** right to sue. ERISA Section 4201(a), in pertinent party, provides:

> **[I]f an employer withdraws** from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

29 U.S.C. § 1381(a) (emphasis added). ERISA Section 1382, in pertinent part, provides:

> **[W]hen an employer withdraws** from a multiemployer, the plan sponsor in accordance with this part shall—

(1) determine the amount of the employer's withdrawal liability,

(2) notify the employer of the amount of the withdrawal liability, and

(3) collect the amount of the withdrawal liability from the employer.

29 U.S.C. § 1382 (emphasis added). This is a due process requirement imposed by the statute rather than a court-created rule. The district court found that the statute clearly reflects a scheme whereby the plan must first wait until a withdrawal has occurred before issuing a Notice and Demand. Petitioner's App. at 91a. Violation of this clear statutory mandate was grounds for the district court to find that Central States was "culpable in jumping the gun." Thus, there was no substantial justification for Central States' position. Moreover, the Seventh Circuit's creation of this substantial justification not only was contrary to the district court's analysis which rejected the pre-*Hunt I* law as "different in kind" from the issue in this case (Petitioner's App. at 94a), but was an improper substitution of its view for the view of the district court.

B. There was no clearly erroneous assessment of evidence.

Central States argues that the district court abused its discretion when it did not consider that Hunt would be ultimately liable for "final" withdrawal payments, which the Seventh Circuit relied upon as the "special circumstances" in this case.[2] Respondent's Brief in Opposition, at 8 to 9.

However, the facts show that the district court considered the issue of final withdrawal liability. In awarding attorneys'

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[2] Hunt believes that it will not be held liable for final withdrawal liability. This issue was argued to a different panel in the Seventh Circuit on January 25, 2002, and has not yet been decided.

fees to Hunt, the district court noted that its decision to grant fees was not inconsistent with Judge Shudar's decision and the arbitrator's decision regarding final withdrawal liability. Petitioner's App. at 13a to 14a. The district court was well aware of the issue of final withdrawal liability. By reversing the district court's decision, the Seventh Circuit, once again, substituted its own view for the district court's opinion, which this Court clearly prohibited in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990) and *Anderson v. Vessemer City*, 470 U.S. 564 (1985).

CONCLUSION

This case presents this Court with a rare opportunity to provide a uniform, objective standard for the circuit courts to award attorneys' fees under ERISA on a clear and undisputed factual record. This case also presents this Court with an opportunity to provide clarification as to how the circuit courts should conduct a meaningful review under the abuse of discretion standard.

Therefore, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

29 U.S.C. § 1381(a) Withdrawal Liability Established.

If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

29 U.S.C. § 1382 Determination and Collection of Liability; Notification of Employer.

When an employer withdraws from a multiemployer, the plan sponsor in accordance with this part shall—

(1) determine the amount of the employer's withdrawal liability,

(2) notify the employer of the amount of the withdrawal liability, and

(3) collect the amount of the withdrawal liability from the employer.